

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA

v.

1:02-cr-01050-3

JOSEPH LOMBARDO

**MOTION TO VACATE SPECIAL ADMINISTRATIVE
MEASURES (“SAMS”) IMPOSED UPON DEFENDANT**

NOW COMES the Petitioner, JOSEPH LOMBARDO, by the undersigned attorney, who moves this Honorable Court dissolve the Special Administrative Measures (hereinafter, “SAMS,”) imposed by the Bureau of Prisons, and in support thereof, states as follows:

PROCEDURAL HISTORY

Petitioner was indicted, convicted and sentenced in the U.S. District Court of the Northern District of Illinois after a jury trial before the Honorable James B. Zagel, and, on February 2, 2009, sentenced to a term of life imprisonment. His timely filed appeal, docketed as 09-1376, was denied on May 23, 2012. His timely filed Petition for a Writ of Certiorari was denied on March 25, 2013, and his Petition for Rehearing was denied on June 3, 2013. Petitioner has been in the custody of the Bureau of Prisons since his arrest in 2006 and determined by the Bureau of Prisons to require constant medical attention. Because of his age, chronic medical conditions, and physical frailty, Petitioner was

designated to and currently resides at the Prison Medical Facility at Butner, North Carolina, (“Butner”). Petitioner is currently 84 years old, and has generally been confined to a wheelchair since 2009. Since being incarcerated in 2006, Petitioner has been a “model prisoner;” having received no institutional incident reports of any sort.

By memorandum dated April 18, 2013, (“Memorandum”) — more than seven years after the Petitioner, Joseph Lombardo was arrested, the Attorney General, implemented Special Administrative Measures (“SAMs”) that impose extraordinary and severe restrictions impairing the ability of defense counsel to communicate with and provide competent legal representation on behalf of Petitioner.

That memorandum, inter alia, provided as follows:

Based upon information provided to me of Lombardo’s proclivity for violence, I find that there is substantial risk that his communications or contacts with persons could result in death or serious bodily injury to person, or substantial damage to property that would entail the risk of serious bodily injury to persons. Therefore, I am requesting that you, pursuant to 28 C.F.R. Section 501.3, implement SAM to restrict Lombardo’s access to the mail, the media, the telephone and visitors. Implementation of the SAM will commence immediately upon notice to the inmate, and the SAM will be in effect for one year from the date of my approval, subject to my further direction.

According to the indictment filed against him by the Department of Justice that led to his arrest and conviction, the only incidents indicating a “proclivity for violence,” to which the Attorney General might possibly be referring, occurred in the 1970s! Docket, 1:02-cr-01050-3. The entire Memorandum implementing the SAM is included herein as Exhibit A. Absolutely no specific act is alleged to justify the SAMs – only some generalized allegation of “information provided to me (the AG) of Lombardo’s proclivity for violence.” Was this “information” a report from the FBI? CIA? NSA? An anonymous phone call? A 30 year-old story from The Chicago Tribune saying that

Petitioner was a “bad guy?” The Attorney General isn’t saying where he got his information. But one thing is certain – the A.G. hasn’t come anywhere near “probable cause” to impose SAMs on Mr. Lombardo. With all due respect to the Attorney General, his proffer, ostensibly justifying the imposition of these draconian conditions against an 84-year-old, chronically ill, wheelchair-user can only be an attempt to appear “tough on crime” by engaging in “elder abuse” against a man who once had a reputation (deserved or not) as a major player in the Chicago “Mob.” Whatever he once was, Joseph Lombardo, Sr. is now a sick, 84 year-old man and the SAMs dictated policy of virtually complete isolation constitutes extra-judicial punishment and administrative overreach.

ARGUMENTS

Petitioner claims that the SAMs designation of April 18, 2013, as it relates to Petitioner, is an arbitrary and capricious application of legislation and regulations promulgated under authority granted by the aforementioned legislation in the wake of the horrific terrorist attacks of 9/11/2001. There is no factual justification cited for the implementation of this restrictive form of detention against the chronically ill, disabled and octogenarian petitioner, other than the bald statements that “his communications or contacts with person could result in death or serious bodily injury to person, or substantial damage to property that would entail the risk of serious bodily injury to persons.” In a nutshell: Since there are no supporting facts, the SAMs must be dissolved.

The Department of Justice created SAMs after the finalization of interim rules that were published on October 31, 2001. 66 FR 55062, Federal Register, April 4, 2007, 28 CFR Parts 500 and 501. Said regulations:

authorized the Bureau of Prisons (BOP), at the direction of the Attorney General, to impose special administrative measures with respect to specified inmates, based on information provided by senior intelligence or law enforcement officials,...where the Attorney General has certified that reasonable suspicion exists that an inmate may use communications with attorneys (or agents traditionally covered by the attorney-client privilege) to further or facilitate acts of violence and/or terrorisms...

The clear implication of this regulation is that it was designed to isolate terrorism suspects who, by words or actions, have the philosophy, motivation, means, and mentality to continue to foment violence from behind bars. Given an objective, current view of the Petitioner and the obvious shortcomings of the Attorney General's affidavit, this justification falls apart, bereft of factual basis.

Petitioner, although he has been convicted of a crime, is still entitled to basic First Amendment rights. "(A) prison inmate retains those First Amendment rights that are not inconsistent with his status as an inmate or with the legitimate penological objectives of the corrections system..." Pell v. Procunier, 417 U.S. 817, 822-823 (1974). Petitioner has been denied his First Amendment rights by the restriction of his access to materials available to other prisoners: free communications with his family, and unmonitored access to legal counsel. The actions of the BOP and the Attorney General cannot be supported by an objective reading of Petitioner's circumstances. There is no evidence that Petitioner has violated any laws in the past 20 years, and his BOP record is bereft of any incident reports of any infractions of institutional rules. Petitioner is an 84 year old man, in ill health, in a wheelchair -- and no physical threat to anyone.

The Justice Department and BOP also overreach, not only in their SAMs designation, but the segregation of Petitioner from the general population at Butner.

Butner is a prison medical facility, filled with the elderly and infirm who, like petitioner, have been deemed by the BOP to require constant medical attention. It strains the outer limits of credulity to presume that, in such an environment, Petitioner could be a threat to anyone within or without the prison system.

Additionally, as applied to Petitioner, the SAMs designation is overbroad and unnecessary. All prisoners in the BOP all well aware that their phone calls are digitally recorded and stored, their mail opened, copied, and read, and their medical, psychological records retrievable at a keystroke by law enforcement agencies lawfully authorized to do so. Only in the mailing and receipt of “legal mail” is a prisoner entitled to privacy. Petitioner only seeks that same rights enjoyed by other institutionally compliant prisoners.

The Attorney General’s rights to designate and enforce a SAMs is not without Limits and must be justified by “new circumstances.” See Mohammed v. Holder, 2011 WL 4501959 (D. Colo. Sept. 29, 2011), denying, in part, defendant prison officials’ motion for summary judgment in civil action by convicted prisoner challenging SAMs;

“The Government’s general justifications for SAMs — involvement in terrorist activities and dangerous communications by others during incarceration — do not address Mr. Mohammed’s conduct or his particular risks [T]here has been no showing that new circumstances justify greater restriction.”

Petitioner’s SAM appears to have been issued under section 501.3(a), which does not authorize any restrictions on attorney-client contact or communications. See Kent v. Dulles, 357 U.S. 116, 129 (1958) (“[W]e will construe narrowly all delegated powers that curtail or dilute” fundamental constitutional rights.”

The BOP has a well-established institutional apparatus in place to address any security concerns regarding the elderly Petitioner without having to resort to a SAMs

designation. Neither the Attorney General nor the Warden at Butner or any other institution where Petitioner has been confined can point to a credible incident report implicating Petitioner in: 1. a disruption of the security or well-being of any institution or individual or 2. a violent incident outside the prison which was orchestrated by or attributable to Petitioner.

The current confinement of Petitioner is comparable to that of a Special Management Unit (SMU), without any of the procedural relief available to the average inmate so confined. Prisoners designated to an SMU are entitled to:

A hearing, including an opportunity to attend, and make an oral statement, present documentary evidence and written witness statements, and have a staff member assist in obtaining these documents... SMU staff are to review inmates initially within 28 days of placement and in conjunction with period reviews of the inmate's program progress and needs every 180 days thereafter.

GAO-13-429, Segregated Housing Units., page 7, 2013. Petitioner has received none of the above, and is barred from participating in prison programs and educational opportunities at Butner. Furthermore, Attorney General Holder has denied Petitioner even a review of the need for the unjustified restrictions for an entire year:

“ . . . and the SAM will be in effect for one year from the date of my approval, subject to my further direction.”

As the Seventh Circuit has noted:

To justify his impairment of communication between attorneys and inmates in the name of security, a prison warden must come forward with facts which tend to support a reasonable suspicion not only that contraband is being smuggled to inmates in the face of established preventive measures, but that their attorneys are engaged in the smuggling. We ground the last requirement on our unwillingness to assume that attorneys—admittedly the partisan advocates in court of their clients' cause—are more willing or more inclined to smuggle contraband past prison officials than are other outsiders who deal

directly with inmates, as well as on our recognition of the constitutional importance of the business which an attorney typically conducts with an inmate, a status not attending the affairs which prison personnel carry on with an inmate

Adams v. Carlson, 488 F.2d 619, 632-33 (7th Cir. 1973). Neither the Warden at Butner nor the Attorney General can point to any incident justifying the restrictions imposed upon Petitioner's counsel in his attempts to assist Petitioner in his legal matters.

The SAMs imposes an unconstitutional restriction upon Petitioner's constitutional right to counsel. The Supreme Court has held that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Procunier v. Martinez, 416 U.S. 396, 419 (1974) , which cited Ex Parte Hull, 312 U.S. 546 (1941)), overruled in part on other grounds in Thornburgh v. Abbott, 490 U.S. 401, 419 (1989). The SAMs restriction upon counsel is completely unnecessary and inappropriate in the absence of some factual justification that has heretofore not been shared.

In addition, the SAMS is unduly restrictive on Petitioner's physical well-being and his mental health, especially given his advanced age. The negative effects of isolation on detainees are well-documented. This fact is supported both in the professional literature discussing the subject, and the most recent General Accounting Office study published in 2013, noting the BOP's systemic problems in implementing solitary-confinement without proper regard for its consequences. See also: Laura Rovner and Jeanne Theoharis, Preferring Order to Justice, 61 AM. U. L. REV. 1331, 1358-1371 (June 2012), which summarizes literature and cases concerning effects of SAM-imposed isolation, including harmful effects on physical and mental health, coercive impact of those effects, and deterioration of client's ability to assist in his own defense); Atul

Gawande, Hellhole, The New Yorker, March 30, 2009. According to the GAO, the BOP has not assessed the extent to which all three types of segregated housing units, including SAMs, impact institutional safety for the better for prisoners or staff. Improvements Needed in Bureau of Prisons Monitoring and Evaluating of Impact of Segregated Housing, GAO-13-429, May, 2013.

Even the United Nations and the rest of the international community has weighed in on the negative effects of long-term solitary confinement visited upon Petitioner in his SAMs designation, viewing it as form of torture. See: Human Rights Committee, General Comment 20, Article 7 (44th session, 1992). The European Court of Human Rights recently issued a ruling barring the extradition of an alleged Arab terrorist to the U.S., stating:

he could remain in pre-trial detention for a number of years and there was no information as to the conditions of that detention; and that it was likely that if convicted in the USA he would be detained in ADX Florence (a "supermax" prison), where he could be placed alone in a cell and the conditions of isolation were likely to exacerbate his mental illness.

Aswat v. United States, Grand Chamber of the European Court of Human Rights, 2013.

The BOP itself has recognized the deleterious effect of prolonged solitary confinement as mandated by SAMs. The BOP Psychology Services Manual states that "extended periods of confinement in Administrative Detention or Disciplinary Segregation Status may have an adverse effect on the overall mental status of some individuals." GAO-13-429, pages 1-5, May, 2013. This does not seem to square with the BOP avowed mission statement to confine offenders in prisons that are safe and humane.

While the SAMs remain in effect, Petitioner remains in what amounts to a 24-hour lockdown status, with unjustified loss of privileges available to other prisoners, and

with psychological and medical effects on him which are unknown due to the restrictions imposed upon him that prevent his family and legal counsel from lawfully interacting with Petitioner. Petitioner reiterates that he is 84-years-old, ill, frail and confined to a wheelchair. Furthermore, Federal Courts have held that punitive confinement for more than 30 days constitutes “cruel and unusual punishment” under the eighth and fourteenth amendments. Finney v. Hutto, 410 F.Supp. 251, 278 (E.D.Ark.1976).

CONCLUSION

The government has not made any persuasive showing why the SAMs restrictions are necessary, nor has it demonstrated that less restrictive alternatives would not suffice. Petitioner has made no effort to communicate with non-family or media, and is unlikely to do so. The blanket prohibitions in the SAMs are clearly improper. There is no allegation or evidence contained in the SAMs that Petitioner has communicated with any outside individuals or groups, or that his receipt and dissemination of materials guaranteed by the First Amendment would pose any danger to the BOP, Butner, or any specific individuals or outside groups.

Inmates may not be subjected to unnecessarily harsh and isolating conditions of Confinement. Wilkerson v. Austin, 545 U.S. 209, 223 (2005) holds that protected liberty interest arise where prison regulations impose “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life...” In the absence of a showing that there is a reasonable necessity for particular SAMs that impose harsh conditions of confinement, they are unlawful and should be vacated.

WHEREFORE, Petitioner moves this honorable court for immediate dissolution of the clearly unconstitutional Special Administrative Measures under which he is currently being held and for any other relief which this court deems just and proper.

Respectfully Submitted,

By: /s/ David Jay Bernstein
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CERTIFICATE OF SERVICE

I, David Jay Bernstein, Esq., attorney for Joseph Lombardo, do hereby certify that a true and correct copy of Reply was duly served on all attorneys of record by filing same on the Court's CM/ECF system, the 23rd day of December, 2013, which will automatically and electronically provide such copy to said attorneys of record.

Signed: /s/ David Jay Bernstein
David Jay Bernstein