

91N3HASC Conference

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x
2

3 UNITED STATES OF AMERICA,
3

4 v.
4

06 CR 442 (LAP)

5 SYED HASHMI,
5

6 Defendant.
6

7 -----x
7

New York, N.Y.
January 23, 2009
2:00 p.m.

10 Before:
10

11 HON. LORETTA A. PRESKA,
11

District Judge
12

13
14 APPEARANCES

15 LEV L. DASSIN
15 Acting United States Attorney for the
16 Southern District of New York

16 IRIS LAN
17 Assistant United States Attorney
17

18 SEAN MAHER
18 Attorney for Defendant
19

19 ALSO PRESENT: Ken Haas, Unit Manager, MCC
20 Adam Johnson, Supervising Attorney,
20

MCC

21
22
23
24
25

1 (In open court)

2 THE COURT: United States v. Syed Hashmi. Is the
3 government ready?

Lan
are

4 MS. LAN: Yes, your Honor. Good afternoon. Iris
5 on behalf of the United States. With me at counsel table

6 Ken Haas and Adam Johnson from the bureau of prisons.

7 THE COURT: Is the defense ready?

8 MR. MAHER: Yes, good afternoon. Sean Maher for
9 Mr. Hashmi.

like

10 THE COURT: Good afternoon. Mr. Maher, would you
11 to go first on this motion?

12 MR. MAHER: Yes.

13 THE COURT: Yes, sir.

Hashmi's

14 MR. MAHER: Thank you. Your Honor, the defense has
15 filed a motion for the Court to consider modifying Mr.

Since

16 pretrial detention conditions. This is not the first motion
17 that the defense has filed, as the Court is well aware.

in

18 May 2007, Mr. Hashmi has been in what I think can fairly be
19 described as solitary confinement. He is under conditions

20 which he is not permitted to discuss, talk to, converse with
21 any other inmate under any conditions.

it

22 He is prevented under the special administrative
23 measures also from participating in group prayer, his
24 visitation with family is greatly curtailed compared to what

2007.

25 was before the SAMs were implemented back in October of

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1 As the Court knows, the SAMs were first in effect for a year
2 starting in the late fall of 2007. They were to lapse

around

3 the end of October 2008. Then we received word that the
4 attorney general's office reissued the special

administrative

5 measures for another 12 months, effective the end of
6 October 2008. Which conceivably takes us through the end of
7 October 2009 if we haven't reached a trial before then.

8 Mr. Hashmi has raised in the motion for the Court's
9 consideration today issues that we raised a year ago, and

also

10 additional issues before the Court. I would like to focus
11 first off on the issue of solitary confinement. And what
12 prolonged isolated confinement does to a human being. I

have

13 presented the Court's deputy with four exhibits for my
argument

14 today.

15 THE COURT: Wouldn't have been so bad if I had a
16 chance to read them ahead of your argument, right?

17 MR. MAHER: Absolutely. They are here for your
18 Court's consideration, and I request the Court consider them
19 after argument is over today.

20 First, I have submitted an affidavit declaration of
21 Dr. Terry Coopers, a psychiatrist who lives in California,

who

22 I submit is an expert in the field of psychiatry. In
23 particular, the effects of long-term confinement, isolated
24 confinement. Attached with Exhibit 1 is the Exhibit 2,

which

25 is the CV of Dr. Coopers.

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1 THE COURT: Has Dr. Coopers examined the defendant?

2 MR. MAHER: Dr. Coopers has not examined Mr.

Hashmi.

3 And the purpose of this affidavit and declaration is not to
4 apprise the Court of any specific mental or psychological

issue

5 with Mr. Hashmi right now. But to apprise the Court of what
6 the social science literature tells us about these very
7 identical conditions of detention. And what can be expected

to

8 happen to a human being who is subjected to isolated
9 confinement over long periods of time.

10 I am not going to obviously read this to the Court.

I

11 would like the Court obviously to consider it with all the
12 deliberations the Court feels is necessary. I would like to
13 highlight just a few points right now for your Honor from

this.

14 THE COURT: Yes, sir.

15 MR. MAHER: First, in the affidavit, Dr. Coopers
16 describes what isolated confinement means. And most --

17 THE COURT: What paragraph are you looking at, sir?

18 MR. MAHER: Sure, your Honor. I am looking at
19 paragraph number seven.

20 THE COURT: Yes, sir.

21 MR. MAHER: And the description of the types of
22 conditions that characterize isolated confinement, I submit,
23 mirror the conditions that Mr. Hashmi are currently under.

He

24 is not permitted out-of-cell recreation with any other
25 prisoners, is by himself. It is essentially in a room with

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1 bars. A cage, if you will, within the institution. He does
2 not get access to the roof recreation that other detainees
get.
3 The room is very confined. I think at most it's maybe 20
feet
4 in length. He is unable to use any exercise machines.
There's
5 no machines available. And it is not open to fresh air as
far
6 as I know or to direct sunlight.
7 Mr. Hashmi, as in the affidavit, eats his meals
alone,
8 he does not have communal eating. When he has visitation,
9 visitation at this point is only with his attorneys, me and
10 Mr. Wahid, and with his mother and his father. Those visits
11 are not contact visits. I have requested, as Mr. Hashmi's
12 attorney, to have contact visits with Mr. Hashmi. That has
13 been denied by the legal department of BOP. I have been
14 informed of that.
15 The booth is approximately 6 feet by 6 feet. I
don't
16 have the exact measurements. There is a metal screen, a
metal
17 screen that cannot be pushed or broken in any way that
18 separates Mr. Hashmi and any visitor. You have to talk
loudly
19 through the screen to be heard. To look at paper through
that,
20 it is very difficult. What I've had to do to see a piece of
21 paper that Mr. Hashmi holds up, I have to move my head back
and
22 forth in order to focus because of the way the screen works.
23 So Mr. Hashmi has to have that same kind of conditions both
24 with his attorney and his family. No contact.
25 As per the SAMs, Mr. Hashmi is subjected to 24 hour

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1 surveillance. There is a video camera mounted in his cell
that
2 has a full view of his cell. On the left from his door is
an
3 open toilet which is right below a sink. Both of those are
4 stainless steel. Immediately to the right of the door is a
5 shower. That shower has what I believe is a stained glass
6 bottom with a raised area maybe a few inches up. Otherwise
the
7 shower has no door, no screening, it is an open shower.
Again,
8 under constant video surveillance. Mr. Hashmi is not
9 permitted, under the rules, to use the toilet or the showers
in
10 any way of covering himself up from the view of the camera.
11 Mr. Hashmi's electronic surveillance also under the
12 SAMS is supposed to prevent and monitor Mr. Hashmi from
having
13 any verbal contact with any other detainee in 10 South.
There
14 are a handful of other people I believe, though I am not at
15 liberty to walk around there, a few other detainees in that
16 area. He is not allowed to yell through his door to talk to
17 them if they walk by. It is my information that one inmate
18 tried to say "assalam alaikum," which basically means peace
be
19 unto you or hello, to another inmate who was under SAM, and
20 that person received a shot, which is the slang word for
21 disciplinary measure for saying hello to another detainee.
22 Mr. Hashmi is subject to the same type of discipline regime.
23 Mr. Hashmi cannot have group prayer, as I mentioned
24 earlier. The guards don't come into Mr. Hashmi's cell, as
far
25 as I am aware. When they want to communicate to Mr. Hashmi,

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1 they yell through his door. Any time a guard is going to
enter
2 or has need to enter Mr. Hashmi's room, it is my
understanding
3 that they suit up in full riot gear in numbers, and then
burst
4 in the door in that manner.
5 So, comparing that to the conditions that Dr.
Coopers
6 is familiar with, what characterizes long-term isolation, I
7 believe it does mirror the conditions that Dr. Coopers has
8 looked at in his career.
9 Dr. Coopers notes the long-term psychological
effects,
10 and he talks about a number of things. He talks about the
term
11 "isolation panic," which is for symptoms that have been
12 discovered in men studied in New York State department of
13 corrections facilities where they have exhibited very
regressed
14 behavior and have resorted to self-mutilation.
15 He also discusses the research by social
psychologist
16 Craig Haney. He has done research on a number of prisoners
in
17 isolated confinement, and he has found a very high
prevalence
18 rate for a large list of emotional symptoms: Over 80
percent
19 reported massive anxiety; over 80 percent complained of
20 headaches, troubled sleep, and lethargy; over half
complained
21 of nightmares, heart palpitations, violent fantasies,
22 depression or despair, and fear of impending nervous
breakdown.
23 Complaints of obsessive ruminations, confused thought
24 processes, over-sensitivity to stimuli, irrational anger and
25 social withdrawal were widespread.

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1 He notes a number of other symptoms that have been
2 documented in these cases. And he notes that even prisoners
3 who do not become psychotic frequently report a number of
4 serious psychiatric symptoms, including, but not limited to:
5 Massive free-floating anxiety; hyper-responsiveness to
external
6 stimuli, including a startle response; perceptual
distortions
7 and hallucinations in multiple spheres, meaning auditory,
8 visual and olfactory; derealization experiences; acute
9 confusional states; the emergence of primitive ego dystonic;
10 aggressive fantasies; and others.
11 In an amicus brief that was submitted to a federal
12 court in Ohio, which I provided to the Court and opposing
13 counsel as Exhibit 3, this is an amicus brief that was
written
14 on behalf of around 10 social scientists, psychiatrists,
15 doctors who are experts in this field. On page four, the
brief
16 notes "No study of the effects of solitary or supermax-like
17 confinement that lasted longer than 60 days failed to find
18 evidence of negative psychological effects." That's from
these
19 experts' survey of the literature in this field.
20 In addition, in this brief, I would like to point
out
21 just a couple other excerpts to the Court. First off, the
term
22 "social or sensory deprivation" is defined on page nine of
the
23 amicus brief about halfway down. It says, according to the
24 definition of sensory deprivation offered by medical
researcher
25 Leo Goldberger, it is an "experimental condition aimed at

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9

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with 1 reducing, altering, or by some means or other interfering
2 a person's normal stimulation from and commerce with his
of 3 environment." And the author notes that virtually all forms
4 solitary or supermax confinement would qualify under that
5 definition.
6 One of the key dangers of this type of treatment is
7 noted on page 10 of the brief in footnote 15, where one
8 psychiatrist who conducted sensory deprivation experiments
put 9 it this way: "The conscious mind is dependent on constant
10 contact with the outside world for alerting, for
orientation,
11 for programming, and for gating of responses. Unless there
is 12 a constant incoming flood of sensation, behavior is highly
13 disturbed and can even be so badly disturbed as to bring on
14 what amounts to transient psychotic states."
15 The authors note that in surveys of techniques used
in 16 torture, that it is --
17 THE COURT: In here?
18 MR. MAHER: We're still here, pages 11 and 12. The
19 authors note that frequently, social sensory deprivation is
a 20 method employed in torture.
21 Another issue that I'd like to highlight to the
Court,
22 this is also referenced on page 18 of the brief, is that the
23 constant -- I don't know how else to put it, but this
constant
24 environment around a person leads to great frustration. And
25 psychologist Thomas Hilliard wrote about experiences of
people

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1 in the San Quentin Adjustment Center who also didn't have
2 meaningful exercise to have an outlet for this frustration.
3 And he noted that the prisoners experienced a pervasive
sense
4 of frustration and hopelessness, deep feelings of despair,
and
5 the possibility that psychological pain of their confinement
6 might drive them to extreme actions and desperate solutions.
7 He concluded that the conditions of confinement in
the
8 adjustment center were overwhelmingly negative, and
9 antagonistic to effective rehabilitation. They were both
10 hostile and provocative, because they provoked hostility,
11 resentment and resistance.
12 I'd like to further point out the work of Craig
Haney,
13 which I referenced earlier. This is on page 21 of the
brief.
14 Going further into the research of Craig Haney, who has
looked
15 at supermax prisons specifically. The brief lists a number
of
16 the effects. And these include that "more than four out of
17 five of those evaluated suffered from feelings of anxiety
and
18 nervousness, headaches, troubled sleep and lethargy or
chronic
19 tiredness; and over half complained of nightmares, heart
20 palpitations, and fear of impending nervous breakdowns."
21 On page 23, other symptoms, and I've skipped over,
as
22 the Court sees, I'm skipping over a lot for brevity sake
now.
23 It is also noted the effects including increases in the
24 following potentially damaging symptoms and problematic
25 behaviors: Negative attitude and effect, insomnia, anxiety,

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1 panic, withdrawal, aggression and rage, paranoia,
hopelessness,
2 self-mutilation, suicidal ideation and behavior.
3 These are some of the findings that are contained
in
4 the brief written on behalf of these social scientists that
I'd
5 like the Court to consider in evaluating our motion.
6 It is clear, I believe, that we can predict with
7 certainty that Mr. Hashmi, kept in these conditions, is
going
8 to be psychologically, emotionally or physically damaged.
And
9 the test before the Court is not as Mr. Hashmi sits here now
is
10 he damaged already. You know, can we prove as defense that
he
11 already has this damage. That's not the legal test.
12 The point I believe of the legal test is to prevent
us
13 from getting to the place where we have to say now, lo and
14 behold, Mr. Hashmi has been damaged by these conditions.
15 THE COURT: I don't believe that's the test either,
16 but I take your point.
17 MR. MAHER: Again, our motion is not at this point
18 saying that we don't understand there are security concerns
by
19 the government. But is to try to come to a way that all
20 parties represented in this court who have their respective
21 roles can find a way that Mr. Hashmi is not damaged, and
that
22 he is able to assist himself in the preparation of his case
and
23 in the trial of his case and assist counsel in a meaningful
24 way.
25 The government has raised in its reply an incident
to

12

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1 the Court I believe in their argument in response that
2 Mr. Hashmi is not a danger, and they have talked about a
shadow 3 boxing incident. That incident was appended to the
4 government's writing.
5 THE COURT: Yes, sir.
6 MR. MAHER: The reply. I just want to talk briefly
7 about that.
8 THE COURT: Yes, sir.
9 MR. MAHER: So the Court can have a fuller picture
of 10 that. This is, I am looking at what was the government's
11 exhibit. I am looking at the first page of this incident
12 report. In which it states that an Officer Barrios observed
13 via video monitoring inmate Hashmi in a cell practicing
shadow 14 boxing and other martial arts moves. It goes on to say that
he 15 was, Mr. Hashmi, was given a direct order to cease. Was
asked 16 why he was performing such activities. And the government
in 17 this report says that Mr. Hashmi stated, "I am practicing
for 18 you guys."
19 Mr. Hashmi was given what is considered a hearing
20 through BOP. I as his attorney was never notified about
this 21 incident until after Mr. Hashmi received punishment for
this. 22 Mr. Hashmi received what was considered a 60 -- excuse me, a
90 23 day shot. He was prevented from having any family visits
for 24 90 days at the end of August through November.
25 Mr. Hashmi, when asked about this, denied the

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13

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1 allegations, and this is on the second page of that report.
2 Where it's noted in paragraph 24, "I am remaining silent on
the
3 accused charge. But the officer didn't give me a direct
order.
4 Tell Haas to give me my punishment and not to come see me no
5 respite."
6 In addition, it was appended to this, a statement
of
7 Mr. Hashmi. And his statement was "I totally deny the
events
8 occur as this two faced individual Barrios claimed. I was
9 exercising to relieve stress as I normally do, and this two
10 faced individual Barrios came and asked me in an entrapping
11 way, uh, you're practicing. Neither did he give any orders
to
12 stop. Proof of this can be found in the audio recording
which
13 the unit manager gets a daily transcript of from the FBI.
14 "I don't recognize your legitimacy to judge me, so
15 send me your punishment and leave me no respite. Allah the
16 exalted says Allah is sufficient for me, and in him do I put
my
17 trust. Quote, and they ill treated them for no other reason
18 that they believed in Allah, exalted in power, worthy of all
19 praise. Him to whom belongs the dominion of the heavens and
20 the earth, and Allah is witness to all things." Signed by
21 Mr. Hashmi.
22 I would submit that the best evidence regarding
this
23 incident would be an audio or video recording of this, if
this
24 is actually going to be used as a criteria to keep the SAMs
or
25 the provisions that we are challenging.

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14

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1 We submit that Mr. Hashmi is not a danger. That
this
2 incident where Mr. Hashmi is trying to exercise, where he
has
3 no other outlet to exercise, no other outlet to talk to
4 anybody, should not be used to prolong the social isolation
and
5 the lack of exercise that he's getting.
6 We have raised the criteria under both Turner for
the
7 conditions, and under Bell v. Wolfish for the length. We do
8 not contest under the length that we have consented to
9 adjournment to prepare for trial. We all understand this is
a
10 complex case. But we do object to these types of
conditions.
11 And I think we were in one position a year ago when it had
been
12 going on. We are now another year into this, and we have
13 another year before us potentially. Hopefully a trial will
14 happen way before then.
15 But at this stage, I have great trepidation that we
16 are on the road to Mr. Hashmi being damaged, and I think
that
17 we can fashion something that alleviates this and meets the
18 security concerns of the government.
19 First off, Mr. Hashmi I think should be entitled to
20 greater family visitation. The literature I think is also
21 clear about visitation, that it has positive penological
22 effects, that it helps someone both adjust and have behavior
23 that the prison officials think is conducive to living under
24 their conditions, and is also beneficial for later
25 rehabilitation.

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1 Mr. Hashmi I believe should be entitled to weekly
2 family visitation. I think that both of his parents should
be
3 able to visit at the same time. They are elderly. His
mother
4 has hearing impairment. Exhibit Number 4, which I provided
the
5 government and the Court, documents her hearing impairment.
6 How visitation has happened up until this day is that
7 Mr. Hashmi has been entitled to visit every other week for
8 ostensibly an hour, is my understanding.

9 THE COURT: Go ahead.

10 MR. MAHER: Many times what happens though is it's
11 unclear when that clock begins. Sometimes it appears the
clock
12 begins when the parents first appeared downstairs to present
13 themselves with their ID. Many times it can take no quicker
14 than 15 minutes to get up. Many times it can take up to 40
15 minutes or more from the front door to see Mr. Hashmi. Very
16 rarely do they get uninterrupted an hour, an hour and a half
17 time.

18 What we request is Mr. Hashmi be allowed a solid
two
19 hours per week face time. Once they are in the booth
together,
20 Mr. Hashmi gets that two hours with his parents. That's the
21 timeframe, that's how often. Once a week.

22 The government has told us there are some dates
where
23 they think the prison officials, the jail officials might
not
24 be able to make a date and would have to reschedule. What
we
25 propose is we have it scheduled for every Monday. If for
some

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16

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1 reason there is a scheduling issue, the fall back could be
that 2 Thursday or if need be that Friday. But Friday is not as
good 3 because of religious reasons. But have a fall back of
4 Thursday.

5 But it seems that considering all of the onerous
6 conditions on Mr. Hashmi, that it is not too much to ask to
7 have weekly visitation like I've described, your Honor.

8 Also, we've asked for communal prayer. Group
prayer.

9 The government has told us that they oppose that. We don't
10 think it is a security concern. This is a maximum security
11 wing. We believe that adequate precautions can be taken.
12 Right now, even when I visit Mr. Hashmi, I am brought into a
13 booth myself, I'm locked in. It is the same procedure for

when 14 parents visit Mr. Hashmi. I'm locked in. It is secured.

Then 15 Mr. Hashmi, who is cuffed, is taken out of his cell, he is
16 escorted by a minimum of two, many times three or more

security 17 guards, and a lieutenant who has to be present. Then

brought 18 in the room and locked. His cell is monitored as to what

goes 19 in and out. I am sure there is a way that some type of
20 arrangement can be made where Mr. Hashmi can have communal
21 prayer or some type of interaction with fellow Muslims that
22 does not breach the security that the institution requires.
23 We'd ask the Court to consider that.

24 Recreation. I'm very concerned about recreation.

It 25 is inadequate at this point. The small -- I'll call it a
room,

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17

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1 it is more like a cage I believe that he is permitted to,
2 quote, work out in, has no machines, it has no work-out
3 equipment. He is not allowed to work out with anybody else.
4 It is not always predictable when he gets to go.
5 We ask for, again, communal recreation which most
6 people at MCC get. It is on the roof. He is then exposed
to
7 natural sunlight and vitamin D. He gets the interaction and
8 he's supervised and he can get an outlet for the tremendous
9 frustration that he is under.
10 We think that Mr. Hashmi should also have a Muslim
11 roommate. That he should have that type of interaction.
The
12 government obviously opposes that, but we want the Court to
13 know that that is a request of ours.
14 I'd like to finally point out to your Honor that
right
15 now Mr. Hashmi is presumed innocent. He's not a prisoner.
He
16 hasn't been convicted. Even people who have been convicted
17 have due process rights. This type of confinement right now
I
18 believe is abominable. I believe that a civilized society
can
19 do better than to place someone like Mr. Hashmi, who has no
20 prior criminal record, who is not accused of -- again, he is
21 not accused of aiding any single plot to hurt anybody or
cause
22 violence. The allegation is that he provided material
support.
23 Not that he furthered a conspiracy to murder, kidnap or
maim.
24 I have represented people convicted, charged with murder,
child
25 molestation, rape, you name it. None have been treated with

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1 this type of oppressive pretrial regime.
2 I ask the Court to survey the literature, survey
the
3 information we presented, and to come up with a solution
4 consistent with what we've asked for. Thank you.
5 THE COURT: Thank you, sir. Ms. Lan.
6 MS. LAN: Your Honor, may we have just one moment.
7 THE COURT: Yes, ma'am.
8 (Pause)
9 MS. LAN: Your Honor, may I proceed?
10 THE COURT: Yes, ma'am.
11 MS. LAN: Thank you, your Honor. I'm just going to
12 respond very briefly because the government has already
13 submitted a letter in response to most of the defendant's
14 arguments.
15 In particular, I wanted to respond to the
defendant's
16 most recent submission of the expert and of the amicus
brief.
17 The government literally received copies of the documents
about
18 two, three minutes before today's oral argument. Therefore
I
19 have not had a chance to assess the credibility of any of
the
20 findings within.
21 But in any event, the government's understanding is
22 that Mr. Hashmi has not at all claimed any current kind of
23 psychological harm. And to the extent he does make any kind
of
24 request for psychological help, I've spoken with the bureau
of
25 prisons, and they have informed me that they would be happy
to

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19

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Conference

1 provide him with any kind of assistance with respect to that
2 issue.

3 That being said, the government also just wants to
4 respond very briefly to a couple of assertions that defense
5 counsel made about what it is to be in solitary confinement.
6 Based on a conversation I've just had with Mr. Haas from

BOP,

7 my understanding is fresh air is actually accessible to the
8 area where Mr. Hashmi currently stays. And furthermore,

with

9 respect to kind of extreme measures for containing

prisoners, I

10 think what Mr. Maher referred to was using suit up teams to
11 talk to Mr. Hashmi in his cell. BOP contends that that is

not

12 what they do, and he is not treated that way. As a result,

BOP

13 would like to just make it very clear that's not how they
14 conduct business there.

15 THE COURT: May I inquire, please, I noticed that
16 Dr. Coopers had in his affidavit at paragraph seven a
17 discussion of cell extractions. That sounded like what
18 Mr. Maher was talking about. And I wanted to be sure that
19 that's what you were talking about, and that what the

proffer

20 is, is that what is described here as a cell extraction is

not

21 the procedure that is employed with respect to Mr. Hashmi

under

22 the normal circumstances.

23 Is that what the government is proffering?

24 MS. LAN: If I may have a moment to inquire with

the

25 BOP.

1 THE COURT: Yes, ma'am.
2 (Pause)
3 MS. LAN: Your Honor, may I proceed?
4 THE COURT: Yes, ma'am.
5 MS. LAN: In speaking with Mr. Haas, my
understanding
6 is that that is what we are referring to. And with respect
to
7 normal procedures, what would normally happen is a couple of
8 individuals would go and ask Mr. Hashmi to leave his cell
when
9 that is appropriate. But in the event that there is some
kind
10 of behavioral issue, such as the defendant refusing to leave
11 his cell, then there would be extra precautions taken. And
--
12 THE COURT: But in the normal circumstance of
13 Mr. Hashmi's confinement, what is described in the affidavit
as
14 cell extraction does not occur?
15 MS. LAN: Yes. That's correct, your Honor.
16 THE COURT: Okay.
17 MS. LAN: With respect to the weekly visit issue,
18 defense counsel and I have discussed this previously. And
we
19 had proposed increasing the amount of time for a visit from
an
20 hour every two weeks to one and a half hours every two weeks
in
21 an attempt to maximize the actual amount of visit time that
the
22 defendant could receive.
23 It is now my understanding that defense counsel
wants
24 two hours every week as opposed to just one hour every week.
25 And the general population defendants who are not under any

21

91N3HASC Conference

1 special restrictions actually don't receive any more than
one 2 hour every week. So he would actually be asking for more
than 3 what a typical inmate, who does not have the type of
security 4 concerns that the government has with respect to Mr. Hashmi,
5 apply here.

6 Obviously the government opposes that. And we are
7 fine with continuing to negotiate with defense counsel with
8 respect to perhaps an alternative solution, given that the
9 weekly visit issue is not a security or penological concern,
10 but primarily a resource issue.

11 But the government's proposed solution seeks to
12 maximize the amount of time that the defendant would have.

But

13 we would be fine with continuing to negotiate that issue.

14 THE COURT: Is that all right with you, Mr. Maher?

15 MR. MAHER: The continue to negotiate --

16 THE COURT: Yes, sir.

17 MR. MAHER: Sure. But what we would like though is

if

18 we can't reach a decision very quickly, we would like the
19 Court --

20 THE COURT: Of course.

21 MR. MAHER: We don't want this to drag on.

22 THE COURT: Let me just say this, without ruling:

I'm

23 obviously not going to order more time than a general
24 population prisoner gets, right? It's not going to happen.

So

25 why don't you folks continue to chat, and if you are not

able

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1 to come to some agreement, then you know my phone number.

How
2 is that? On this issue, on the visitation issue.
3 MR. MAHER: I understand what the Court is saying.
4 THE COURT: All right, sir.
5 MR. MAHER: May I just add one thing, your Honor.

I
6 do -- and I don't want to interrupt counsel's argument, but
7 just this one point. I don't think it is fair to compare
8 Mr. Hashmi's visitation to general population. We'll gladly
9 switch and put Mr. Hashmi in general population and get one
10 hour of visitation. This extra hour of visitation is needed
11 because of --
12 THE COURT: That is not an opportunity open to you.
13 All I'm saying, for your guidance, I would not anticipate
14 ordering more visitation time for Mr. Hashmi than for a
general
15 population prisoner. I would not anticipate that, without
16 ruling that. But, if you people wish to continue to
negotiate,
17 and the government seems willing to do so, sounds like a
good
18 idea. If you don't want to and you want a firm ruling, I'm
19 happy to do that. You just tell me what you want.
20 MR. MAHER: We'll talk and then apprise the Court.
21 THE COURT: Yes, sir. Thank you. Ms. Lan.
22 MS. LAN: Thank you, your Honor. Just one last
point
23 of clarification, which is that the defense had asserted
that
24 it is not always the case that the defendant actually gets
an
25 hour of visitation time because it can be murky as to when
the

1 clock starts. My understanding from speaking with BOP is
that 2 he always gets an hour, and that it is a full hour of social
3 time. Not starting when any visitor actually walks in the
4 door, but rather when the person actually sits down to visit
5 with the inmate. I wanted to clarify that for the Court.
6 I believe that all the rest of the arguments that
7 defense counsel made have already been addressed in the
8 government's brief. So unless your Honor has any further
9 questions, the government rests on its brief.
10 THE COURT: Thank you.
11 MS. LAN: Thank you, your Honor.
12 THE COURT: Mr. Maher?
13 MR. MAHER: Nothing further.
14 THE COURT: Is there anything else, sir, that you
wish 15 to call my attention to in the exhibits? I have had a
chance 16 while you were all here and in between to review the
exhibits. 17 Is there anything else you want me to look at in there, sir?
18 MR. MAHER: Well, again, the Exhibit 4 which I
really 19 didn't discuss goes to the idea of both parents being able
to 20 visit together. Which I think would mean a tremendous
amount 21 to the family and to Mr. Hashmi. And I think that in the
22 government's response brief, they noted an observation that
it 23 seemed that it was okay. Well, that's their observation.
We 24 have documentation showing that she has documented hearing
25 loss. It is difficult. And I also think that this isn't

24

91N3HASC Conference

I
be
1 something that really puts the resources of BOP to the test.
2 think this is something that can be -- some compromise can
3 reached, hopefully.

4 THE COURT: Ms. Lan, anything else on that?
5 MS. LAN: No, your Honor. The government has
conveyed
6 to BOP the defense's claim that there is a hearing issue.

And
to
7 because, based on BOP's observations there does not appear
8 be one, we have reached an impasse on that particular issue.
9 And assert that with respect to the parents, because of the
10 typical security concerns in having more than one person

visit
an
11 at a time in the special housing unit, the BOP cannot allow
12 exception.

13 THE COURT: Anything else on that, sir?
14 MR. MAHER: Just on that issue, again, my
15 understanding of the security procedure is that it works how
16 when I visit. That is, it is one step at a time. Both of

his
a
17 parents are brought into the secure area, they are locked in
18 room, the door is locked. Metal door. Then at that point
19 Mr. Hashmi is escorted, cuffed, secured by multiple people,
20 locked in the room by a lieutenant who only has the key.

They
21 are in locked rooms talking through the grate. Then at that
22 point, when it's over, either the family comes out first,

then
23 Mr. Hashmi remains locked in the cell, or he is brought out,
24 secured in his cell, then they are brought out. There is no
25 opportunity, ever, that they are interacting or there is any

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1 type of what I would consider an opportunity for a physical
2 confrontation. So I don't think that it strains BOP,
3 particularly that both parents, again, are elderly, no --
4 THE COURT: This is a very touchy question, Mr.

Maher.

5 How old is "elderly"?

6 I can't hear you.

are

7 MR. MAHER: Can I plead the Fifth on that. They

8 retired. I'll use that.

9 THE COURT: You want to give me an age, sir?

10 MR. MAHER: Over 60.

11 THE COURT: Well --

12 MR. MAHER: A youthful elderly.

13 THE COURT: Thank goodness you said that. I feel
14 better already.

BOP

15 MR. MAHER: I don't think, again, this strains the

on.

16 resources and this should be something that they can give

17 THE COURT: How old are you?

18 MR. MAHER: I'm definitely pleading the Fifth.

19 THE COURT: Ms. Lan, anything else on that?

which

20 MS. LAN: Yes, your Honor. Just very briefly,

security

21 is that it's not just a resource issue, but rather a

22 concern. It is much harder for BOP to monitor two people

23 visiting one person, as opposed to just one person visiting

one

24 person, as I've been informed. So it is not just a resource

25 issue, but it is also attached to a security concern.

1 THE COURT: Sir, anything further?
 2 MR. MAHER: Just last thing is this is how
 visitation
 3 occurred before the SAMS. Both were allowed to visit
 together.
 4 That's all.

5 THE COURT: Anything else?
 6 MS. LAN: No, your Honor. Thank you.
 7 THE COURT: All right. Thank you, counsel, for
 your
 8 submissions and your arguments.

9 I think the relevant law has been set out in the
 10 Court's prior order, which is dated January 16, 2008, and
 which
 11 is attached to the government's papers.

12 First, I adhere to my prior finding that the
 13 government has offered sufficient evidence for the Court to
 14 conclude that the SAMS are reasonably related to legitimate
 15 penological interests. I recall, of course, the evidence
 16 relied on in the past ruling, that is of the defendant's
 17 willingness to provide aid to al Qaeda through his cell

phone
 18 and use of his apartment, the defendant's stated intention
 to
 19 overthrow the United States through whatever means
 necessary,
 20 and the defendant's threatening statements to British
 21 authorities.

22 In addition, I rely on the more recent evidence
 that
 23 counsel have discussed today relating to an August 2008
 24 incident in which two BOP officials observed Mr. Hashmi
 25 practicing what appeared to be martial arts movements, as

set

27

91N3HASC

Conference

1 forth in the contemporaneous incident report, also attached
to
2 the government's papers. According to those officials, when
3 Mr. Hashmi was questioned, he stated "I am practicing for
you
4 guys."

5 Now, as counsel has pointed out, Mr. Hashmi
disputed
6 that conduct in his written statement at the hearing stating
7 that he was merely exercising. At the hearing Mr. Hashmi
did
8 not request any witnesses, but apparently relied on his
written
9 statement to which Mr. Maher also referred, and which is
10 attached as well.

11 Following a hearing, Mr. Hashmi was found guilty of
12 practicing boxing and threatening the staff. This conduct
also
13 supports the finding that the SAMs are reasonably related to
14 legitimate penological interests, and the safety of other
15 inmates and staff. It also supports a finding that
relaxation
16 of the SAMs could well endanger BOP personnel.

17 With respect to the factors under Turner, number
two
18 and four, both of which relate to alternatives, these
factors
19 also weigh in favor of the government. As we know, we are
20 putting aside for the moment the length of the family
visits.

21 But with respect to the one or two folks at a time,
certainly
22 the conduct relied on above, including the August incident,
23 supports the legitimate penological interest of having only
one
24 person and not two visiting Mr. Hashmi at a time.

25 Similarly, with respect to the other requests, for
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91N3HASC Conference

1 example, communal prayer, any roommate -- Muslim or not --
2 communal recreation and the like, I find again that the
3 legitimate penological interests have been demonstrated, and
4 that there have been no reasonable alternatives suggested,
5 particularly in light of the limited space and staff at the
6 MCC, and the need to accommodate other inmates.
7 In so finding, I rely both on the matters I've
stated
8 before, including the government's experience in cases like
9 United States v. Salim, and the more recent evidence
regarding
10 Mr. Hashmi, in particular the August 2008 threats to bureau
of
11 prisons guards.
12 All of this evidence demonstrates that these
13 accommodations of communal prayer, communal recreation, a
14 roommate, and the like, will pose an unreasonable danger to
15 bureau of prisons personnel, and that no alternatives to
these
16 restrictions exist. Particularly in light of the effect
such
17 accommodations would have on other inmates and prison
18 resources.
19 Now, as we know, Mr. Hashmi also separately
challenges
20 the length of his pretrial detention. The government
suggests
21 in its papers that it really is at bottom a challenge to the
22 conditions of Mr. Hashmi's confinement. The government
refers
23 to the statement in Mr. Hashmi's papers at page nine where
he
24 says "it is undisputed that this is a complex case, and that
25 the defense has consented to pretrial delay, in order to

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1 prepare for trial. The defense, however has never consented
to
2 the conditions of Mr. Hashmi's pretrial detention."
3 I tend to agree that the challenge is one to
4 conditions, but nevertheless, will consider the challenge to
5 the length of pretrial confinement.
6 As an overarching matter, it is certainly well
settled
7 that as long as pretrial detention is administrative, rather
8 than punitive, it is constitutional. As I've already found,
9 the conditions of Mr. Hashmi's confinement are related to
10 legitimate penological interests, and thus are
administrative
11 and not punitive in nature, and thus are constitutional.
12 Even if analyzed strictly as a challenge to the
length
13 of pretrial detention, however, the defendant's motion must
14 still be denied. As we know, in determining whether the
length
15 of pretrial detention has become unconstitutionally
excessive,
16 the Court considers: One, the length of the detention; two,
17 the extent of the prosecution's responsibility for delay of
the
18 trial; three, the gravity of the charges; and four, the
19 strength of the evidence upon which the detention was based.
20 It seems that Mr. Hashmi only disputes the gravity
of
21 the charges and the strength of the evidence. Contrary to
22 Mr. Hashmi's argument, however, the charges are serious. He
is
23 charged with conspiracies to provide material support or
24 resources to al Qaeda, and conspiracies to make or receive a
25 contribution of funds, goods, or services to and for the

91N3HASC Conference

1 benefit of al Qaeda, together with the corresponding
2 substantive charges. There can be no question that such
3 charges are serious in this day and age.

4 Also contrary to the defendant's assertion, the
5 evidence against him is strong, and the evidence upon which

the

6 SAMs were imposed and reimposed is strong. It consists of

not

7 only Mr. Hashmi's own statements, but the statements of a
8 coconspirator and corroborating documentary evidence.

9 Finally, while Mr. Hashmi does not seem to dispute

it,

10 it is significant that the prosecution bears little if any
11 responsibility for the delay in the trial, given Mr.

Hashmi's

12 decision to litigation a variety of issues. For example,
13 whether his counsel may be required to obtain security
14 clearances, and once those clearances were obtained, the
15 defense's consent to pretrial extensions in order to prepare
16 for trial.

17 Obviously, as counsel have acknowledged, this is a
18 complex case with voluminous evidence. Such pretrial
19 preparation is obviously in the defendant's best interest

and

20 in the interest of justice.

based

21 Accordingly, even analyzing Mr. Hashmi's motion

denied.

22 on the near length of his detention, the motion must be

Hashmi's

23 For the reasons set out above, counsel, Mr.

24 motion challenging the SAMs restrictions is denied.

25 Ms. Lan, Mr. Maher, you will continue to talk about

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91N3HASC Conference

1 the visitation issue and you'll let me know if there is an
2 issue after that.

3 MS. LAN: Yes, your Honor.

4 MR. MAHER: Yes.

5 THE COURT: Counsel, our next conference is on
6 February 17, at 11 o'clock, at which time we will argue the
7 motion to dismiss the indictment. Is that correct?

8 MS. LAN: Yes, your Honor.

9 MR. MAHER: Yes.

10 THE COURT: Thank you, ladies and gentlemen.

Anything

11 else today?

12 MS. LAN: Nothing further from the government.

Thank

13 you.

14 MR. MAHER: Nothing from defense.

15 THE COURT: Thank you, ladies and gentlemen. Good
16 afternoon.

17 o0o

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19

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