

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

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 07-550-03
KABONI SAVAGE	:	

**SURRICK, J.**

**NOVEMBER \_\_, 2012**

**MEMORANDUM**

Presently before the Court is Defendant Kaboni Savage's Motion for Appropriate Relief, wherein he requests an order directing the Federal Detention Center in Philadelphia ("FDC") to permit him opportunities to engage in outdoor recreation and visit with his children while incarcerated at the FDC. (ECF No. 673) For the following reasons, Defendant's Motion will be granted in part and denied in part.

**I. BACKGROUND**

The factual background of this case, particularly as it pertains to the Special Administrative Measures ("SAMs") placed on Defendant Kaboni Savage while he has been housed as a pretrial detainee in various prison facilities, is more fully set forth in the Court's February 9, 2012 Memorandum and Order granting in part and denying in part Defendant's Motion for Relief from Special Administrative Measures Which Are Interfering With Trial Preparations In This Capital Case (ECF Nos. 359, 360), and October 21, 2010 Memorandum and Order denying Defendant's Motion For Relief From Special Administrative Measures (ECF Nos. 162, 163). By way of general background, Defendant is currently serving a thirty-year sentence for his convictions in 2005 for the crimes of conspiracy to manufacture and distribute cocaine

and crack cocaine, money laundering, and witness tampering. *See United States v. Savage*, No. 04-269 (E.D. Pa.), at ECF No. 846. On May 9, 2012, a federal grand jury returned a seventeen-count Fourth Superseding Indictment (“Indictment”) charging Defendant with conspiracy to participate in a racketeering enterprise, twelve counts of murder in aid of racketeering, tampering with a witness, conspiracy to commit murder in aid of racketeering, retaliating against a witness, and using fire to commit a felony. (Fourth Superseding Indictment, ECF No. 480.)<sup>1</sup> The Government contends that Defendant ordered several of the murders charged in the Indictment while incarcerated as a pretrial detainee at the FDC. The Government is seeking the death penalty against Defendant and his Codefendants Robert Merritt and Steven Northington. (*See* ECF Nos. 196, 197, 198.)

While Defendant was housed at the FDC awaiting trial on the 2005 drug convictions, he allegedly threatened to kill witnesses, their family members, prison employees and law enforcement agents. According to the Government, court-authorized recordings intercepted at the FDC reveal that while Defendant was housed there, he ordered the firebombing of the home of Eugene Coleman in retaliation for Coleman testifying against him before a federal grand jury. The firebombing took the lives of six members of Coleman’s family, including four children and Coleman’s mother. In February 2007, the Attorney General authorized the imposition of SAMs. The Government concluded that Defendant posed a significant threat to others while incarcerated and that he has a “proclivity to violence.” (SAMs Mem. 1, Feb. 1, 2010 (on file with Court).)

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<sup>1</sup> Defendant’s sister, Kidada Savage, is also named as a Defendant in the Indictment, and is charged in six of the murder counts. Defendant Steven Northington is charged in two of the murder counts and Defendant Robert Merritt is charged in six of the murder counts. All three Codefendants are charged with other crimes in the Indictment.

The SAMs are based upon Defendant's previous convictions, the charges currently pending against him, "information that the orders to commit the arson and murder of the family members were communicated by [Defendant] while incarcerated," and because "there is a substantial risk that [Defendant's] communications or contacts with persons could result in death or serious bodily injury to persons." (*Id.*) The Attorney General has reauthorized the SAMs annually. (Gov't's Resp. 3, ECF No. 695.)

On July 16, 2010, Defendant moved to strike the SAMs in their entirety. (ECF No. 137.) We held a hearing on September 30, 2010 to address the issue of whether Defendant was barred from seeking relief from the SAMs due to his failure to exhaust administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) ("PLRA"). We determined in our Memorandum and Order of October 21, 2010, that Defendant was not required to exhaust his administrative remedies before challenging aspects of the SAMs that directly affected his ability to prepare his defense in this criminal action. *See United States v. Savage*, No. 07-550-03, 2010 WL 4236867, at \*7 (E.D. Pa. Oct. 21, 2010). We heard testimony and argument on the constitutionality of the SAMs during an evidentiary hearing held on October 22, 2010. On October 28, 2011, we entered an Order denying Defendant's request to lift and strike all SAMs restrictions. (ECF No. 333 (filed under Seal).)

On August 7, 2012, Defendant filed a civil Complaint in this District challenging the SAMs restrictions. *See United States v. Holder, et al.*, No. 12-4479 (E.D. Pa., filed Aug. 7, 2012). The Complaint was filed against the Attorney General, the Federal Bureau of Prisons ("BOP"), various individuals at the BOP, the FDC, and the FBI. (*Id.*) The Complaint seeks declaratory and injunctive relief with respect to every aspect of the SAMs restrictions imposed on

Defendant. (*Id.* at ¶¶ 80-87.)

Defendant filed the instant Motion for Appropriate Relief on October 21, 2012. (Def.'s Mot., ECF No. 673.) On November 1, 2012, the Government filed a Response to Defendant Savage's Motion to Alter "SAM" Conditions to Permit Visits and Access to Public Areas. (Gov't's Resp.)

## **II. DISCUSSION**

Federal regulations provide that the BOP may implement SAMs upon the direction of the Attorney General, when "there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons." 28 C.F.R. § 501.3(a). To alter, remove, or otherwise challenge a SAMs restriction in federal court, a prisoner is generally required to first exhaust administrative remedies through the BOP. The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners must follow a multi-step grievance procedure to exhaust administrative remedies. *See* 28 C.F.R. §§ 542.13-524.15. We have previously determined that the PLRA does not apply to certain prison conditions that "directly affect the Court's ability to ensure that Defendant receives a fair and speedy trial." *Savage*, 2010 WL 4236867, at \*7. Specifically, we determined that Defendant is not required to exhaust administrative remedies under the PLRA with respect to aspects of the SAMs restrictions that "directly implicate the court's ability to fairly and efficiently manage the defendant's criminal prosecution." *Id.* at \*6.

To the extent that a prison condition affects Defendant's ability to prepare his defense in

this criminal action, he may challenge the condition on the basis that it constitutes an impermissible restriction of a constitutional right. *See, e.g., United States v. Mikhel*, 552 F.3d 961, 963 (9th Cir. 2009); *United States v. Hashmi*, 621 F. Supp. 2d 76, 78 (S.D.N.Y. 2008). Constitutional challenges to prison conditions are evaluated under a “reasonableness” standard. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under this standard, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* In *Turner*, the Supreme Court set forth four factors for courts to consider when determining whether prison regulations are reasonably related to legitimate penological interests: (1) “whether there is a ‘valid, rational connection’ between the regulation and the legitimate governmental interest used to justify it;” (2) “whether there are alternative means for the prisoner to exercise the right at issue;” (3) “the impact that the desired accommodation will have on guards, other inmates, and prison resources;” and (4) “the absence of ‘ready alternatives.’” *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) (citing *Turner*, 482 U.S. at 87, and *United States v. Felipe*, 148 F.3d 101, 110 (2d Cir. 1998)). In evaluating the reasonableness of a prison condition, courts “owe ‘substantial deference to the professional judgment of prison administrators.’” *Beard v. Banks*, 548 U.S. 521, 528 (2006) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also O’Dell v. Netherland*, 112 F.3d 773, 777 (4th Cir. 1997) (recognizing that “it is not for the federal courts to so micromanage the Nation’s prisons”).

**A. Defendant’s Request for Visitation with his Children**

Defendant requests that he be permitted to visit with his children. In his Motion, Defendant contends that the SAMs restrictions do not explicitly prohibit visitation, but that his inability to visit with them is a collateral result of the FDC’s placement of Defendant in a second-

floor suite at the FDC in order to remain in compliance with the SAMs restrictions. (Def.'s Mot. 1.) The FDC's policy of prohibiting children from visiting any area of the prison other than the public visitation area on the first floor is in place "for the protection of the children themselves, and to ensure the safe and orderly running of a correctional institution that houses many dangerous inmates." (Gov't's Resp. 5.) Defendant is not permitted in public visitation areas because of the SAMs restrictions. (*Id.*) When Defendant argued this matter in open court, he argued that his children have a substantial interest in seeing him, and that visitation with them directly impacts his ability to effectively prepare his mitigation strategy for trial. Defendant argues that visitation is absolutely necessary in order to develop evidence for presentation at trial regarding his relationship with his children. This mitigation evidence would be presented in the penalty phase of the trial. (Nov. 13, 2012 Hr'g Tr. 150 (on file with Court).)

The Government responds that Defendant's request for visitation with his children should be denied because Defendant has not exhausted his administrative remedies under the PLRA. (Gov't's Resp. 5-7.) The Government also contends that there is a valid rational connection between the SAMs restrictions and the Government's interest in protecting lives. (*Id.* at 10.) The Government was advised by counsel for the FDC that Defendant's request could not be accommodated in light of the serious liability and security issues posed by permitting children to visit the second floor of the institution. (Nov. 13 Hr'g Tr. 150.) The Government proposed an alternative to Defendant's request: to facilitate a meeting between Defendant and his children at the Courthouse or the FBI offices. (*Id.* at 151.)

With regard to the question of whether Defendant was required to exhaust his administrative remedies prior to challenging the visitation policy, clearly the ability to visit with

his children could impact the preparation of Defendant's mitigation defense. A capital defendant should be provided the opportunity to develop any evidence he wishes to present at the sentencing phase of the trial. Defendant is not required to exhaust administrative remedies under the PLRA before challenging aspects of the SAMs restrictions that directly affect his ability to prepare his defense in this action. *Savage*, 2010 WL 4236867, at \*7. Accordingly, the PLRA does not bar Defendant's challenge to the restriction on visitation with his children.

With regard to the question of whether the restriction reasonably relates to legitimate penological interests, we agree with the Government that the protection and safety of children is a legitimate penological interest. The SAMs restriction that prohibits Defendant's access to the first floor public visitation area and the FDC policy that prohibits children from accessing the second floor are rationally related to legitimate concerns of safety and security. This first *Turner* factor supports the visitation restriction. However, the remaining *Turner* factors weigh against the FDC's policy. There does not appear to be alternative means for Defendant to exercise this right, and none have been suggested. The desired accommodation – to allow periodic visits with his children – will have some impact on prison guards, other inmates and prison resources; however, that impact should not be significant. While additional security measures will likely be employed during the visitations, such additional measures are justified by Defendant's need to prepare his mitigation defense. Finally, the Government's proposed alternative – to permit Defendant to visit with his children at the Courthouse or at the FBI offices – does not appear to be “ready” or practical in light of the heightened security that would be required to accommodate such a request outside of the prison setting.

Accordingly, Defendant's request that the Court order the FDC to permit him to visit with

his children while incarcerated is granted. The FDC shall provide Defendant and his counsel with the opportunity for visitations with Defendant's children at the FDC. The visitations may occur prior to and during the trial.

**B. Defendant's Request for Outdoor Exercise**

Defendant also requests that he be provided opportunities for outdoor recreational activities. (Def.'s Mot. 2.) He claims that, while incarcerated, his ability to exercise is restricted to his cell and an adjacent cell where he reviews his discovery material. Defendant argues that the SAMs restrictions do not explicitly prohibit outdoor recreation, and that the denial of some form of outside recreation may constitute cruel and unusual punishment. (*Id.* at 1-2.) The Government responds that Defendant's grievance is barred because he has failed to exhaust administrative remedies under the PLRA. (Gov't's Resp. 7-9.) The Government was advised by FDC officials that the SAMs restriction prohibiting Defendant's contact with other inmates makes it impossible for Defendant to be transported to any of the special housing unit ("SHU") recreation areas. (*Id.* at 10.) According to the Government,

[t]he proximity of the SHU recreation areas to numerous SHU cells would allow for communication between [Defendant] and other inmates, which is forbidden. Moreover, inmates in SHU recreation areas can be heard in lower outdoor recreation areas, as well as by the public in the street. This cannot be allowed to happen.

(*Id.*)

Defendant did not argue that the restriction on outdoor recreation in any way affects his ability to prepare his defense in this criminal action. Even if he had, Defendant's argument would be meritless. Defendant's right to receive a fair and speedy trial is not affected by his ability to engage in outdoor recreational activities. As a result, the PLRA applies to this prison



restriction and Defendant is required to first exhaust administrative remedies prior to raising his complaint with the Court. *Savage*, 2010 WL 4236867, at \*7. Defendant has failed to provide any evidence in his Motion that he raised this issue through the appropriate administrative channels prior to filing the Motion. In any event, Defendant is not being deprived of an adequate opportunity to exercise. The area where Defendant is housed consists of his cell and a large area adjacent to his cell where he is permitted to meet with his attorneys, review the discovery materials and prepare for trial. He can use either area for exercise. The restriction on outside recreation is not unreasonable under the circumstances and certainly does not violate Defendant's constitutional rights. Accordingly, Defendant's request that the Court order the FDC to provide him outdoor recreation is denied.

### **III. CONCLUSION**

For the foregoing reasons, Defendant Kaboni Savage's Motion for Appropriate Relief will be granted in part, and denied in part.

An appropriate Order will follow.

**BY THE COURT:**

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**R. BARCLAY SURRECK, J.**

