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ERIC MCDAVID

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ERIC MCDAVID, et al. Defendants.	NO. CR-S-06-0035-MCE **APPEAL TO DISTRICT COURT JUDGE OF MAGISTRATE JUDGE'S ERRONEOUS DECISION DENYING BAIL UNDER THE BAIL REFORM ACT** DATE: February 28, 2006 TIME: 8:30 a.m. JUDGE: HON. MORRISON C. ENGLAND

APPEAL OF MAGISTRATE'S ERRONEOUS DETENTION ORDER

Defendant Eric McDavid appeals the Magistrate Judge's erroneous denial of bail in the present case. The order on detention must be vacated. Simply, "Liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 747, 107 S. Ct 2095, 2101 (1987). In Salerno, the Supreme Court upheld the Bail Reform Act, 18 U.S.C. 3142 et seq., against this above--quoted standard, because among other things, the Act requires that the Magistrate Judge find, by clear and convincing evidence, put on by the government, that no condition or combination of conditions will reasonably assure the court that the defendant will not flee or pose a risk of danger if released.

That standard was not upheld in the instant case.

REVIEW OF THE DETENTION ORDER

The present appeal rests on subdivision (b) of 18 U.S.C. § 3145, which concerns "[r]eview and appeal of a release or detention order":

> (b) Review of a detention order.-- If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

Review is *de novo*. United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990).

The standard set forth in section 3145(b) does not require the moving party to show new information, unlike section 3142(f), which authorizes a motion to reopen a bail hearing to consider information "not known to the movant at the time of the hearing . . . that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required..."

FACTUAL BACKGROUND

The arrest. Defendant Eric McDavid and his two present co defendants were arrested without a warrant on the morning of Friday, January 13, 2006 by various members of law enforcement, including the FBI.[1] It is unknown on what exact charges their warrantless arrest was based upon at that point. They were in the K Mart parking lot in Auburn. Shortly thereafter, a federal criminal complaint was filed which led to the present indictment. They were not brought to federal court on the charges that day for an unknown reason, but instead were sent to the Sacramento County Jail to be held until their arraignment 4 days later, Tuesday, January 17, 2006. Monday, the 16th, was a National Holiday.

The parties appeared in court on January 17, 2006 and counsel was appointed for defendants McDavid and Jenson; defendant Weiner had retained private counsel. A bail hearing was set for defendant McDavid on Tuesday, January 24, 2006; his

[1] This comes from the Criminal Complaint on file.

appointed attorney was Mike Long, a member of the CJA panel who was at that time in a jury trial in federal court before District Judge England in USA v. Rodgers et al . Weiner's bail hearing was set for that Friday, January 20, 2006. Mr. Long would not be present at that bail relating to Ms. Weiner, as his client (Mr. McDavid) was not going to be there and Mr. Long himself was in a jury trial that day in federal court.

The bail hearings. Ms. Weiner did indeed have her bail hearing on Friday, January 20, 2006 and evidence was heard by the Magistrate Judge. An FBI Agent testified, as did an expert called by the government. Cross examination was had by Weiner's attorneys (she had 2 retained attorneys that day). Exhibits were introduced by both sides, and argument was heard.[2]

Eric McDavid's family then retained his present counsel, Mark Reichel, after the bail hearing and over the weekend. Mr. Reichel attended the bail hearing for Mr. McDavid on Tuesday the 24th. After that hearing, Mr. McDavid was detained by written order on January 31, 2006. Mr. McDavid had offered at his bail hearing the following for his release:

1. All of the available equity in his parents sole residence, the long time family home they currently reside in the Auburn area (Forest Hill). The equity was estimated at $400,000– $500,000;

2. 3rd party custody of both his mother and father;

3. Intense pretrial services supervision, on whatever terms they required;

4. Drug testing, psychological counseling;

5. House arrest, 24 hours a day, with no outside privileges, no phone privileges and no computer privileges, as well as no contact with codefendants;

6. Ankle monitoring of the house arrest;

7. Post the parents house pursuant to a Vaccaro bond whereby any violation of *any or just one* of the court's release orders would result in revocation and

[2] Minutes of the hearing that day.

forfeiture of bond and equity;

The terms proposed by Mr. McDavid were in essence everything that his parents had, which was almost a half a million dollars, and terms of release as onerous as a jail environment. Complete house arrest with no outside privileges. There could be no more restrictive conditions than a jail situation; the proposed conditions were also subject to forfeiture for any violation.

LEGAL ARGUMENT

THE MAGISTRATE JUDGE WAS IN ERROR IN DETAINING THIS DEFENDANT WITHOUT BAIL

The Detention Order's facts. The Magistrate Judge's Order had relevant factual findings as follows.

* In the "Introduction," (page one) The Magistrate found that the defendants, (all of them) were in concert with the aims of the Earth Liberation Front (ELF), and found the ELF group to be one that advocates destroying property and at times people who are at odds with the ELF group aims.

While there was some testimony, hotly contested, at the Weiner bail hearing on this group, (their aims and whether any of the defendants were in concert with such a group,) there was none of that whatsoever at the *McDavid* hearing. Not one scintilla of this evidence was presented at McDavid's hearing.

* In "Facts Common to All Defendants" (page 2), the next paragraph of the Order, the Magistrate notes that the evidence for his decision comes from the Complaint affidavit and *Weiner's detention hearing*.

Importantly, the Magistrate Judge does not state that it comes from anything adduced at McDavid's detention hearing, where McDavid and his counsel were present.

* The Magistrate Judge then spends the next 12 paragraphs discussing the evidence in the charges against Mr. McDavid, referencing either the Criminal Complaint Affidavit or else testimony adduced at the Weiner bail hearing on January

20, 2006, where neither Mr. McDavid nor his attorney were present.[3]

This analysis ends on page 5 of the Order.

The Detention Order's Legal Rulings. The Magistrate Judge then turned to the applicable law on page 6 of the Order. The Magistrate Judge found that the charges, Conspiracy, compelled a "presumptive offense" under the Bail Reform Act at page 6 and in footnote 1 of his Order. This was incorrect.[4]

Conspiracy cannot be one of the limited and *enumerated* offenses which trigger the onerous effect of a "presumption" under the Bail Reform Act. Foremost, it is specifically not listed in the act. According to the legislative history to the Act, these discrete predicate categories "in effect *serve to limit* the types of cases in which detention may be ordered prior to trial." S. Rep. No. 98-225, at 20, reprinted in 1984 U.S. Code & Admin. News 3182, 3203. See also United States v. Himler, 797 F.2d 156 at 160 (3rd Cir. 1986) ("The legislative history of the [Act] makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a *narrowly-drafted statute* . . . addressed to the danger from 'a small but identifiable group of particularly dangerous defendants.'" (quoting S. Rep. No. 98-225, at 6-7, 1984 U.S. Code & Admin. News at 3189). Secondly, common sense also dictates that conspiring to do an act is one thing, to actually do the act is another thing all together. As well, the rule in presumption cases also requires a specific fact based judicial inquiry for the defendant: A presumption may be

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[3] McDavid's present attorney, Mark Reichel, attended the bail hearing sporadically –in and out-- that day in the spectator section of the courtroom. He had not been substituted in yet, his client was not present, and he had not been fully retained at that time. His substitution of attorneys was filed on the following Monday and signed by the Magistrate Judge the following Wednesday. Mr. Reichel obviously could not have asked questions or cross examined any government witnesses. Mr. Reichel had not even met his client yet.

[4] The Bail Reform Act specifically provides for a detention hearing in (1)cases involving crimes of violence; (2) cases involving a maximum sentence of life imprisonment or death; (3).cases involving serious drug offenses (those involving maximum sentences of ten years or more); (4.) cases involving recidivist offenders (those with two or more relevant felonies); (5.) cases involving a serious risk of flight; or (6.) cases involving a serious risk that a defendant will obstruct justice.

It is under the first prong that the Magistrate Court held the hearing.

rebutted by some evidence that the nature of the defendant's specific crimes and prior behavior–that their individual circumstances suggest that "what is true in general is not true in the particular case." United States v. Dominguez, 783 F.2d 702 at 707 (quoting United States v. Jessup, 757 F.2d 378 at 384 (1st Cir. 1985)(Bryer, J.) This would be very difficult to do in charges simply of conspiracy (as here) which often requires little if any conduct or action or "substantial step" to be indicted or charged.[5]

This point is very significant because absent a showing that one of the subdivision 3142 (f) conditions exists, detention is not authorized. United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986).[6] [7]

Next, at page 8, the Magistrate Judge misstates the law again. The Order

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[5] The Ninth Circuit very recently dealt with a determination of what exact charges qualify for the presumption as a "crime of violence" under the Act; specifically, as to whether the trial courts must look only to the specific enumerated crime charged, or whether the crime "involves" a crime of violence. In that regard, in U.S. v. Twine 344 F.3d 987 (9th Cir. 2003) the Ninth Circuit ordered the parties to submit supplemental briefing on the issue of that matter and whether a portion of the opinion in U.S. v. Byrd, 969 F.2d 106, 109 (5th th Cir. 1992) should be adopted in the Ninth Circuit; the portion of Byrd they referenced was the holding that detention was not limited to the exact crime charged, but, rather, to cases "involving a crime of violence." U.S. v. Twine 353 F.3d 690 (9th Cir. 2003) (Parties ordered to submit supplemental briefing as to "Whether the Bail Reform Act provides for a detention hearing in a case that 'involves a crime of violence' as distinguished from a case where the 'charged offense' is a crime of violence. 18 U.S.C. § 3142 (f)(1); United States v. Byrd, 969 F.2d 106, 109-110 (5th Cir. 1992)").

The Ninth Circuit received the supplemental breifing, and then announced that no judge of the Circuit had any longer sought rehearing of the matter. U.S. v. Twine 362 1163 (9th Cir. 2004). This is not surprising: Byrd is not followed by for the proposition in question by any other circuit court. See United States v. Chimurenga, 760 F.2d 400 (2nd Cir. 1985); United States v. Dillard, 214 F.3d 88, 90-91 (2nd Cir. 2000)(If the arrest offense is not withing the statutory definition of "crime of violence", no detention hearing will be held.)

[6] Additionally, this burden shifting "presumption" business is very significant as it is contrary to the presumption of innocence; the court in Salerno dealt only with a facial challenge to the Act and has not yet addressed this aspect.

[7] Indeed, as the Fifth Circuit has instructed, "...a person's threat to the safety of any other person or the community, in the absence of one of the six specified circumstances, could not justify detention under the Act. There can be no doubt that this Act clearly favors *nondetention*. It is not surprising that detention can be ordered only after a hearing; due process requires as much. What may be surprising is the conclusion that even after a hearing, detention can be ordered only in *certain designated* and *limited* circumstances, irrespective of whether the defendant's release may jeopardize public safety. Nevertheless, we find ourselves in agreement with the First and Third Circuits: a defendant's threat to the safety of other persons or to the community, standing alone, will not justify pre-trial detention." U.S. v. Byrd, 969 F.2d 106, 109 (5th Circuit 1992). (Italics added.)

states that the court will apply the presumption Congress intended, and then notes that the government has added "significant weight to that presumption..." This conflates the standards and approaches. A presumption is statutorily set up; it is simply the starting point. It is subject to rebuttal–that is what the statute itself states. Id. It could not be subject to rebuttal if the presumption were "so strong in this case" as this Magistrate has in effect ruled. Once the presumption applies, the defendant then must simply produce sufficient evidence to rebut the presumption, in which case the Government must still bear the burden of persuasion of risk of flight by a preponderance of the evidence, and for danger to the community by clear and convincing evidence. See 18 U.S.C. § 3142(e), (f). The presumption in all cases is simply subject to rebuttal. Id. Detention of this defendant pretrial, in light of the factors favoring release which were offered at his bail hearing would result in the Bail Reform Act being unconstitutional as applied to this defendant in violation of his equal protection, due process and Eighth Amendment rights.

A defendant cannot be detained on dangerousness grounds even in a "presumption" case unless the Court makes a finding that **no release condition** will reasonably assure the safety of the community. And, the presumption only shifts the burden of production, and not persuasion, to the defendant. United States v. Reuben, 974 F.2d 580 (5th Cir. 1992), cert denied 504 U.S. 940 (1993). The burden of production requires the defendant to produce only "some credible evidence" showing reasonable assurance of appearance and/or no danger to the community. United States v. Clairborne, 793 F.2d 559 (3rd Cir. 1986).

What the Magistrate Judge got wrong was a lack of understanding that once the defendant rebuts the presumption with production of evidence,[8] the government

[8] Once the defendant has produced evidence that in his particular circumstance he is not likely to flee or engage in criminal activity while on release, the presumption is rebutted. Economic and social stability and no relevant criminal record may provide such rebutting evidence. United States v. Dominguez, 783 F.2d 702, (7th Cir. 1986). Further, the defendant's burden is only one of "production", and it is "...not a heavy one to meet." Id at 707. It will be satisfied by "coming forward with some evidence that...the defendant will not...endanger the community if released. Id. United States v. Mercedes, 254 F.3d 433, 436 (2nd. Cir. 2001) (Burden to rebut only involves a "limited burden of production–not a burden of

then bears the burden of proof on dangerousness beyond clear and convincing evidence. United States v. Giampa 755 F. Supp. 665, 668 (W.D. P.A. 1990). Such findings cannot be based upon evidence that the defendant has been a danger in the past except insofar as the past suggests future misconduct. United States v. Dominguez, 783 F.2d 702 (7th Cir. 1986). Regardless of the United States's proof, the Court may not insist upon a guarantee that the defendant will not pose a threat to the community; objectively reasonable assurance is all that is required. United States v. Orta, 760 F.2d 887 (8th Cir. 1985). The standard is whether any combination of conditions will "reasonably assure" the Court that the defendant will not be a danger to the community. United States v. Gerbo, 948 F.2d 1118, 1121 (9th Cir. 1991). The foregoing is consistent with the teachings by the Ninth Circuit on the following principles regarding the Bail Reform Act, stated 16 years ago in United States v. Townsend, 897 F.2d 989 (9th Cir. 1990)that:

> 1. Federal law has traditionally provided that a person arrested for a non-capital offense shall be admitted to bail. [Citation.]
>
> 2. Only in rare cases should release be denied. [Citation.]
>
> 3. Doubts about the propriety of release are to be resolved in favor of defendants. [Citation.]

Id. at 993-994.

Here, not only can the presumption not legally apply as the charge is not an enumerated charge, but the Magistrate Judge nevertheless then finds this to be some type of "super presumption" case. And, he supports the point with the evidence from the criminal complaint and the testimony at the Weiner detention hearing. Regardless of the fact that the case is not actually a presumption case, and regardless of the fact that the court used the criminal complaint and hearsay evidence where McDavid was not present and could not cross examine, the Bail Reform Act still prefers some sort of conditional release, and a court must exhaust all possible conditions of release before detaining without any bail. The court could

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persuasion.)

have been reasonably assured that McDavid would make his court appearances and not cause harm based upon his house arrest, ankle monitoring, 3rd party custody, the intense supervision of Pre Trial Services, and the forfeiture of his family's only home and asset.

Evidence from the criminal complaint[9]. Such evidence cannot be used to detain the defendant without bail. This is a significant point. It is not just that the criminal complaint has been admitted in evidence at the bail hearing; it results in a no bail holding, something highly discouraged and illegal under the Act and the Eighth Amendment.

The specific criminal complaint in this case is based almost primarily upon what FBI Agent Nasson Walker wrote down, which is what he heard about the case from other FBI Agents. What he heard from other FBI Agents was told to them by the informant, and, in some cases, Agent Walker heard from FBI agents who themselves had heard from other FBI agents what the informant had said the defendant allegedly said. For clarity, the informant allegedly told an agent what the defendant supposedly said, the informant then told Agent Walker, who then wrote this in to the complaint.

This is substantial, multiple hearsay. This cannot be allowed in a bail hearing.[10] In essence, the recent U.S. Supreme Court opinion in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) on Confrontation Rights does not

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[9] Inquiry at the bail hearing really should be limited to the defendant's risk of flight or risk of causing harm, and the amount of bail necessary to defend against those risks. What should not be bantered about is the guilt or innocence of the defendant. The Magistrate Judge did note this portion of the law correctly, when he referenced that the Ninth Circuit teaches that evidence of guilt is the least factor to be weighed in the equation. This is the correct teaching from the Ninth Circuit, for good reason. It is inconceivable that a defendant, presumed innocent, should have to defend himself against charges at this preliminary proceeding, where no indictment had yet been issued, and where the hearing is not held as a trial would be in regard to the admission of evidence. The defendant is in way too precarious a position if indeed the guilt or innocence of the defendant is the main factor to be determined.

[10] You can't always believe everything your hear or even read; even when it comes from a very official and knowledgeable source. See Exhibit A attached hereto, a copy of the USA Today National Newspaper. Tragically, the headlines mistakenly informed the world that the 11 West Virginia Coal Miners were alive.

allow for detention in these circumstances, especially in light of recent Ninth Circuit application of those principles.

In U.S. v. Hall, 419 F.3d 980 (9th Cir. 2005), the Ninth Circuit addressed hearsay evidence in supervised revocation proceedings. There, the Court found that revocation of supervised release is not part of the criminal prosecution and therefore the "full" panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Specifically, the Court observed that revocation deprives an individual not of the absolute liberty to which every citizen is entitled, but rather to the only conditional liberty dependant on parole conditions. As such, the right of confrontation does not apply to such individuals. Id. At p. 985. The Court then went on to advise district courts that nevertheless, Hall enjoyed a due process right to confront witnesses against him during his supervised release hearings; this is only overcome if the government shows good cause for not producing the witnesses. Id. At p. 986. The right to confrontation must then be weighed against the government interest in proceeding by hearsay. Id.[11]

Significantly, those convicted of a crime, on supervised release, have a substantially reduced expectation of the "full panoply" of rights afford those simply charged with a crime. This is undisputed.

Next, in another recent case, this Circuit teaches that pretrial releasees retain their Fourth Amendment rights, and all searches require a showing of probable cause, despite any pre-release consent to search given by the releasees as a condition of the release. United States v. Scott, 424 F.3d 888 (Sept. 9, 2005). Thus, warrantless searches of pretrial detainees is per se illegal, the same as for any other citizen not subject to post-verdict supervision. If a pretrial releasee retains their Fourth Amendment rights prior to trial, then it seems automatic that a pretrial detainee also retains their Sixth Amendment Confrontation right.

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[11] Hall did not involve the multiple levels of hearsay as herein. The hearsay was the statement of a domestic violence victim of Hall who gave her story to the police; the officer she spoke with testified at the hearing about what the victim told him.

Crawford, Hall and Scott combine, at a minimum, to disallow for unreliable hearsay at detention hearings; especially where the hearsay is, as in this case, multiple level hearsay.

***Weiner's hearings cannot be used against defendant McDavid*.**

While defendant McDavid has a Sixth Amendment Right to confrontation at the detention hearing, he also retains at least his substantive and also procedural rights to due process at the hearing as well. U.S. v. Salerno, 481 U.S. 739, 749, 107 S. Ct. 2095 (1987).[12] Also see 18 U.S.C. 3142(f)(2)(B) stating that, at a pre trial detention hearing, the defendant has the right to call witnesses, be represented by counsel, right to testify, right to cross examine witnesses called by the government. Due process is satisfied when a person has the opportunity to be heard, to be present, to notice, and to cross examine the witnesses against them.

Neither due process nor any other Constitutional Right of a pretrial detainee is satisfied when they are not present, do not have counsel, and are not allowed to cross examine the witnesses. Neither McDavid nor his attorney was present during Weiner's detention hearing.

Recently the Second Circuit declared as violative of due process a bail hearing where the district court allowed a defendant to be detained *post verdict* of guilt under the Bail Reform Act where the government submitted it's reasons for detention ex parte. The Second Circuit, discussing the *lesser* liberty interest post verdict than pre trial, still found an ex parte submission violative of due process. United States v. Abuhamra, 389 F.3d 309, 319-323 2nd Cir. 2004). The same cry can be made--just much louder–where neither a pretrial detainee nor his attorney was even present during what amounted to his bail hearing.

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[12] "...The government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full blown adversarial hearing, the Government must convince a neutral decision maker by clear and convincing evidence that no conditions of release can reasonable assure the safety of the community or any person."

Salerno at p. 750.

The Magistrate's Order must be revoked to address this illegal detention.

DE NOVO HEARING BEFORE THIS COURT.

In support of the de novo hearing before this court, once the prior Order is revoked, the defendant submits the following.

The Bail Reform Act. The Bail Reform Act *favors release* in all but a few cases. The Act provides that:

> Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer **shall** issue an order that, pending trial, the person be --
>
> (1) released on personal recognizance or upon execution of an unsecured appearance bond . . . ;
>
> (2) released on a condition or combination of conditions . . . ;
>
> (3) temporarily detained [for certain reasons]; or (4) detained [if conditions set forth in subdivision (e) are met].

18 U.S.C. § 3142(a). Conditions of release range from release on personal recognizance or unsecured bond, subd. (b), to "the least restrictive further condition, or combination of conditions, that [the] judicial officer determines will reasonably assure the appearance of the person as required," subd. ©. A long list of useful conditions is provided in the statute in order to facilitate release rather than detention. See subd. (c)(1)(B).

The defendant submits the same conditions as proposed to the Magistrate Judge. The conditions are as restrictive as jail, if not more so.

The 3142(g) factors of the defendant, set forth in the attached Declarations, are as follows:

At age 28, he has no prior criminal record. He was raised with his family, almost primarily in California. He attended high school and led a very normal life; he participated in the football team and was a normal high school boy from a small town. He left home to live very nearby after age 18, attended college and worked. He was a few units shy of an A.A. degree. The college was close to home in the Auburn area. The work was in the Sacramento and Auburn area. In every single

respect, he led a very normal and common law abiding life.

He is in good physical health, very concerned about his health and his diet. At least he was until he was put into the jail. He has also always had excellent mental health.

His length of residence in the community is extensive and very strong. He has traveled since the Summer of 2004, less than 2 years ago, but has always returned back to his parents home and to the Sacramento/Auburn area. This is his home. His travels are insignificant; a 26 year old boy can travel for a while, and then return home on each occasion without that working against his "ties to the community."

He is very close with his family, and they are a close family.

Mr. McDavid was not on any type of probation or any other supervision while he traveled.

The court is requested to review and consider the large number of the letters submitted in support of Mr. McDavid, attached to the Declaration of Mark Reichel, as well as the other declarations submitted.

Additional Legal Considerations.

The conditions of his confinement make further pre trial confinement at the Sacramento County Jail violative of the Bail Reform Act and the Constitutional Guarantees for pretrial detainees.[13] The U.S. Constitution prohibits the punishment of pretrial detainees in any manner whatsoever. Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004); United States v. Howard, 429 F.3d 843 (9th Cir. 2005).[14] The Eighth

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[13] Numerous cases, including some from within this Circuit, hold that at some point, due process requires release on conditions where continued detention is in derogation of a pre trial defendant's Constitutional Rights. U.S. v. Ailemen, 165 F.R.D. 571, 1996 US Dist. LEXIS 8699 (N. Dist. C.A. 1996); See also U.S. v. Vastola et.al. 652 F. Supp. 1446 (D. Ct. New Jersey 1987); U.S. v. Lopez, 827 F.Supp. 1107 (D. Ct New Jersey 1993); U.S. v. Archambault 240 F. Supp. 2d 1082 (D. Ct. South Dakota December 2002)

[14] An excellent discussion of the foregoing is set forth in Jones v. Blanas, 393 F.3d 918 (9th. Cir. 2004), a case involving a civil rights suit for damages against the Sacramento County Jail and its Sheriff. The plaintiff had completed his criminal sentence, and was held in the jail awaiting final disposition upon the civil commitment as an alleged Sexually Violent Predator. The Ninth Circuit noted that he was

Amendment applies to the Bail Reform Act. Salerno. This defendant can clearly show that his pretrial detention occurs in conditions which violate his Constitutional right to be free from punishment prior to trial.[15]

Vegan diet. Defendant is a Vegan, as described in the attached declarations. His Vegan diet is based upon his strongly, sincerely and firmly held beliefs, which are the same as a religious belief. As more specifically detailed hereinafter, the

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entitled to at least the same rights as a pretrial detainee in a criminal case, and that his claims were incorrectly analyzed by District Judge Shubb as Eighth Amendment claims when they were to be judged under the more "protective" standard of the Fourteenth Amendment. As someone who stands in the shoes of a pretrial detainee, he was to be afforded the "more considerate" treatment to which he was constitutionally entitled as a civil detainee during his confinement. The Ninth Circuit discussed the constitutional ban on punishment of pretrial detainees, and examined the experience in total separation, called "T-Sep." T Sep at the Sacramento County Jail was found by the Ninth Circuit to be in fact indistinguishable from punishment; the restrictions on exercise, out of cell activity, visits, and other programs was found punishment despite the Sheriff's reply that the purpose behind the T-Sep placement was not punishment at all but administration of the jail.

The Jones court explained for the district court that the more protective Fourteenth Amendment standard applies to conditions of confinement when detainees have not been convicted of a crime. The Fourteenth Amendment requires the government to do more than provide the "minimal civilized measure of life's necessities" for non-convicted detainees. Along that authority, the Court instructed that

> As for Jones's time in T-Sep, the declaration of the sheriff's deputy that T-Sep was 'not a disciplinary category' is belied by the restrictions Jones and others faced while in T-Sep. The significant limitations on, or total denials of, recreational activities, exercise, phone calls, visitation privileges, out-of-cell time, access to religious services, and access to the law library, indicate that in numerous respects confinement in T-Sep was substantially more restrictive than confinement in the Main Jail. Thus a presumption of punitiveness arises as to Jones's year in T-Sep as well as his year in the general population. Once again, the defendants must have an opportunity to offer legitimate, non-punitive justifications, but a bare assertion of the requirement of keeping SVPA detainees separate from the general population pursuant to California Penal Code sections 4001 and 4002(a) will not suffice. While this goal imposed by state law is a sensible one, the state must show how the bevy of restrictions Jones faced in T-Sep was not 'excessive in relation to' the purpose of keeping civil and criminal detainees separate, Demery, 378 F.3d at 1028 (citation and internal quotation marks omitted), and why this purpose could not have been achieved by 'alternative and less harsh methods,' Hallstrom, 991 F.2d at 1484 (citation and internal quotation marks omitted). If the criminal population can be safely housed without the restrictions of T-Sep, it is difficult to see why SVPA detainees could not be so housed as well.

Id. At p. 934.

[15] An appropriate quote from well familiar literature on such a reverse penological system: "Let the jury consider their verdict," the King said, for about the twentieth time that day. "No, no!' said the Queen. "*Sentence first--verdict afterwards*." "Stuff and nonsense!"'said Alice loudly. "The idea of having the sentence first!" "Hold your tongue!"said the Queen, turning purple. " I won't!" said Alice. "Off with her head!" the Queen shouted at the top of her voice.

Allice's Adventures in Wonderland, Chapter XII Alice Offers Her Evidence, Lewis Carrol.

defendant has a Constitutional right to his Vegan diet based upon the Free Exercise Clause of the First Amendment and the Religious Land Use and Institutionalized Persons Act (hereinafter "RLUIPA").

Congress enacted RLUIPA in response to the Supreme Court's holding in City of Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997), declaring unconstitutional the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(b). RLUIPA applies both to programs or activities that receive federal financial assistance and to substantial burdens on religious exercise having an effect on interstate commerce. 42 U.S.C. § 2000cc-1(b). The Ninth Circuit has affirmed Eastern District Judge Karlton in upholding the new statute's constitutionality. May Weathers v. Newland, 314 F.3d 1062. (9th Cir. 2002) (finding RLUIPA constitutional). By its terms, RLUIPA is to be construed to favor *broad* protection of religious exercise. See 42 U.S.C. § 2000cc-3(g). The statute defines religious exercise as "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." Id. § 2000cc-5(7)(A). (Emphasis added). This reflects an extension of the definition provided in RFRA, which defined exercise of religion as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4); Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001) (noting the change in definition); Henderson v. Kennedy, 347 U.S. App. D.C. 340, 265 F.3d 1072, 1073-74 (D.C. Cir. 2001) (noting that the definition

of religious exercise in RLUIPA expanded upon the protections of RFRA).[16] [17]

In enacting RLUIPA, the United States Congress decided that inmates of any prison or jail should be allowed judicial relief from any governmental regulation or action that imposes a substantial burden on their right to exercise their religion unless the prison or jail proves that the burden on the inmate: (1) is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C.S. § 2000cc-2. As a result, under RLUIPA, it is no longer enough for prison or jail officials to show that a challenged regulation is reasonably related to a legitimate penological interest; under RLUIPA they must show that a compelling governmental interest requires it and that no less restrictive alternatives are available. Marria v. Broaddus, Deputy

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[16]RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -
>
> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a).

[17] In upholding RIULPA, the Supreme Court in 2005 declared in an inmate's rights suit that

> The 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . .' Smith, 494 U.S., at 877, 110 S. Ct. 1595. Section 3 covers state-run institutions -- mental hospitals, prisons, and the like -- in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. 42 U.S.C. § 2000cc-1(a); § 1997; see Joint Statement S7775 ('Institutional residents' right to practice their faith is at the mercy of those running the institution.'). RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.

Cutter v. Wilkinson, 125 S. Ct. 2113 at 2121 (2005). Exactly the point: if not in jail, McDavid could maintain his years long Vegan diet lifestyle.

Comm of Programs, 2003 U.S. Dist. LEXIS 13329 (Dist. Ct. S.D. N.Y. July 2003).[18]

In addressing the RLUIPA requirements and upholding an Orthodox Jewish inmate's claims for only Kosher foods based upon RLUIPA and the Free Exercise Clause, in an opinion that speaks loudly in the present case, a district court in September of 2005 in Wisconsin held that

> The need to justify its actions by a 'compelling governmental interest' places a high burden on the County. Fashioned by the Supreme Court to insure that governmental action that impinges on the fundamental rights of individuals or impacts adversely upon a suspect class is subjected to strict scrutiny, San Antonio School District v. Rodriguez, 411 U.S. 1, 16, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973), the 'compelling interest' standard requires a significantly stronger justification than the reasonableness test adopted by the Court in Turner. In Employment Division v. Smith, 494 U.S. 872, 886, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990), the Court noted that if all laws challenged on free exercise grounds were subjected to this standard, many 'would not meet the test.' 'Any society adopting such a system,' Justice Scalia commented in his decision for the majority, 'would be courting anarchy.' Id. See also Agrawal v. Briley, 2004 U.S. Dist. LEXIS 16997, 2004 WL 1977581 at * 8 (N.D. Ill) (granting summary judgment RLUIPA claim in favor of prison inmate denied religious diet).
>
> Here, defendants have made no effort to establish a compelling governmental interest and instead have argued simply that the efforts made to accommodate Andreola's religious dietary laws were reasonable. Given the high burden placed upon the County by RLUIPA and the fact that the defendants have not addressed its applicability or the standard it imposes, I

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[18] A recent district court opinion, after reviewing the legislative history of the act and the case law that preceded it, explained that inmates now have greater Free Exercise rights than ever before, because

> Apparently dissatisfied with the Supreme Court's holding that prison officials should be accorded substantial deference in their evaluation of the penological interests that must be weighed against inmates' interest in the exercise of their religion inside the nations prisons and jails, Congress passed RLUIPA, which in effect overruled the Court's decisions in Turner and O'Lone as they apply to prison regulations or policies that impact on the religious practices of inmates. In Turner, to repeat, the Court ruled that in order to ensure that courts afford appropriate deference to prison officials, prison regulations alleged to infringe constitutional rights would be judged under a reasonableness standard -- 'the regulation is valid if it is reasonably related to legitimate penological interests.' Turner, 482 U.S. at 89. In enacting RLUIPA, Congress decided that inmates of any prison or jail that receives federal funds inmates should be allowed judicial relief from any governmental regulation or action that imposes a substantial burden on their right to exercise their religion unless the prison or jail proves that the burden on the inmate: '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' 42 U.S.C. § 2000cc-2. As a result, under RLUIPA, it is no longer enough for prison or jail officials to show that a challenged regulation is reasonably related to a legitimate penological interest; under RLUIPA they must show that a compelling governmental interest requires it and that no less restrictive alternatives are available.

Andreola v. State of Wisconsoin, Rock County, 2005 U.S. Dist. L:EXIS 19535 (East. Dist. Wisc. Sept. 2005).

conclude that it would be improper to grant summary judgment on this claim. Andreola v. State of Wisconsoin, Rock County, 2005 U.S. Dist. LEXIS 19535 (East. Dist. Wisc. Sept. 2005).

Nor may the government, the U.S. Marshal's or the Sacramento County Jail deny defendant his dietary rights by asserting "budgetary constraints." As the Ninth Circuit just instructed in regard to the illegal pretrial shackling of defendants last November,

> The Supreme Court has already held that financial concerns should not be a justification for cutting back on the constitutional rights of criminal defendants. See Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 392, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992). For example, we have held that a city's financial crisis does not allow it to maintain over-crowded jails that deprive people of their constitutional rights. Stone v. City and County of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986). As one commentator has put it, 'allowing a governmental entity to plead budgetary constraints allows it to second-guess the Court's determination of what the law requires and to argue, in essence, that it is exempt from constitutional standards.'See Barbara Kritchevsky, Is there a Cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation, 35 Rutgers L.J. 483, 560 (2004).

United States v. Howard, 429 F.3d 843 (9th Cir. 2005).

Even the pre-RLUIPA case law establishes the defendant's clear right to this diet. For example, in Ashelman v. Wawrzaszek, 111 F.3d 674 (9th Cir.1997), this Circuit instructed that, for an inmate who adheres to Orthodox Judaism, that inmate must be provided a completely Kosher Diet, in accord with the laws of his religion. The state prison system had produced the following substantial evidence in their favor at the trial, and these findings were adopted on appeal. The trial court found that of the general population of some 12,000 inmates, only approximately 70 are Jewish. It also found that the religious diet requirement for most inmates is met by the vegetarian or pork-free diet; but, that a kosher diet cannot be prepared in a standard prison kitchen; that building separate kosher kitchens, or a central kosher kitchen to serve all units of the prison, would be prohibitively expensive and pose a security risk because of the need to load and transport food trays; that a frozen TV-style kosher meal costs about $ 5.00 in comparison with $ .84 for a regular

meal; and that providing three frozen kosher meals per day would be prohibitively expensive and might create a dangerous appearance of favoritism, inviting envy, jealousy, and potential friction which might affect the safety of prison staff and inmates. Id. At 676.

In Ashelman, on the basis of these findings, the trial court concluded that there was a valid and rational connection between the limitations placed on the number of kosher meals provided to inmates and the prison's concerns with respect to perceived favoritism and allocation of prison resources. It further concluded that supplying one kosher meal per day and two vegetarian or pork-free meals per day was a reasonable alternative in light of the prison's legitimate penological concerns about cost and favoritism. For these reasons, the trial court held that Ashelman's First Amendment rights were not violated. Id.

The Ninth Circuit had little trouble reversing. Importantly, even in this pre RLUIPA case, the Ninth Circuit advised that it would have reversed even under the more lenient standard of "reasonably related to penological goals" standard pre RFRA and RLUIPA. There, it stated that

> ...the record in this case does permit us to determine that reasonable alternatives to the prison's policy of providing one frozen kosher TV-dinner, supplemented with vegetarian or nonpork meals, do exist. The warden virtually concedes that Ashelman's kosher TV-dinner could be supplemented with whole fruits, vegetables, nuts, and cereals that are not tough to come by. While nutrition concerns are legitimate, there is no evidence that they are greater with the diet that Ashelman proposes than with the diet that he has been provided, which he could not eat. The evidence shows that disposable utensils are also available, at modest cost. And the warden himself proposed a program (in 1984) that would have substantially satisfied Ashelman's dietary requirements, but which for some reason wasn't pursued. The evidence also shows that the prison accommodates the dietary requirements of other religious groups, including Muslims, Sikhs, and Seventh-Day Adventists, without disruption. Under these circumstances, it does not appear that the difficulties envisioned by the prison are insurmountable. To the contrary, this evidence of 'obvious, easy alternatives' shows that the policy is unreasonable as applied to Ashelman.
>
> The existence of reasonable alternatives decisively tips the balance in favor of Ashelman's free exercise right. Accordingly, the prison must provide a diet sufficient to sustain Ashelman in good health without violating the laws of kashruth.

Id at p. 677. What is so important is that this is a pre RLUIPA case and appears to be based upon the lenient standard of "reasonably related to legitimate penological goals standard in effect pre RFRA and RLUIPA.[19] (Also see Jordan v. Snyder, 2005 U.S. Dist. LEXIS 21662 (Southern Dist. Illinois September 22, 2005) (Plaintiff, an African Hebrew Israelite in Illinois prison system, needed vegan diet on religious grounds. The district court found that it is well settled that observance of religiously mandated dietary restrictions is a form of religious practice protected by the First Amendment.)

Agrawal v. Briley, et. al 2004 U.S. Dist. LEXIS 16997 (Northern District of Illinois August 2004) is extremely helpful. There, an inmate was a Vaishnava Hindu who could only eat a vegan diet free of meat and eggs. Such a diet was readily available in the prison system to the Hebrew Israelite faith. The prison administrators required Agrawal to obtain first a letter from a "church, mosque or clergy from a Hindu Temple" stating that he was a practicing Hindu and that his requested vegan diet was required. Agrawal established that no such verification letter was required of the Hebrew Israelite faith.

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[19] Another pre RFRA and RLUIPA case from out of district holds the same. There, against only a "reasonably related" standard, it was held error to not provide a modified version of a vegan diet to an inmate of the Wican religion. In Goodman v. Asst. Deputy Director Carter, 2001 U.S. Dist. LEXIS 9213 (Northern Dist. Illinois 2001), an inmate of the "Wican" religion in the Illinois Correctional System requested a special vegetarian diet, modified from a Vegan diet. The prison system desired to provide a strict Vegan diet (exactly as McDavid desires here), although the prison found the Vegan diet more restrictive; it was providing it to the members of the Black Hebrew Israelites. Goodman wanted to supplement that with eggs and milk products, per his personal religious beliefs. The district court found his vegetarian convictions were entitled to First Amendment protections.

> The court spoke right to the heart of this case when stating that
>
> > The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. It is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation. First Amendment rights depend on a sincerely-held religious belief, not adherence to a recognized religion or sect. It was also well-established that a prison had to make reasonable accommodations to prisoners' religiously-based dietary requirements.

Id at p. 43.

The prison replied that prisoners receiving vegan food go through a separate food line, supplement their meals with extra servings of fruits, vegetables and starches. As well, the vegan meals are more costly and more perishable than regular meals. There is a higher chance for waste of food as a result of not knowing how many vegan meals to prepare unless part of a regulated religious group. And, fruits and vegetable can be used to make alcohol. Id at p.26. In the face of this, the district judge granted summary judgement on Agrawal's First Amendment Free Exercise claims and also his claims under RLUIPA for a vegan diet in the prison.

In Mr. McDavid's case, he is denied the appropriate vegan diet at the jail. He and his attorney and family have tried everything. The Marshal's Service and the Jail simply will not accommodate this diet. See the attached Declaration of Mark J. Reichel.[20]

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[20] Convicted inmates at the jail are protected by the California Code of Regulations. The pertinent part, 15 CCR 1241 (2006) provides that the "Minimum Standards For Local Detention Facilities" are

§ 1241. Minimum Diet

The minimum diet provided shall be based upon the nutritional and caloric requirements found in the 1999-2002 Dietary Reference Intakes (DRI) of the Food and Nutrition Board, Institute of Medicine of the National Academies, the 1990 California Daily Food Guide, and the 2000 Dietary Guidelines for Americans. Facilities electing to provide vegetarian diets, and facilities that provide religious diets, shall also conform to these nutrition standards. The nutritional requirements for the minimum diet are specified in the following subsections. A wide variety of food should be served.

(a) Protein Group. Includes beef, veal, lamb, pork, poultry, fish, eggs, cooked dry beans, peas, lentils, nuts, peanut butter and textured vegetable protein (TVP). One serving equals 14 grams or more of protein; the daily requirements shall be equal to three servings. In addition, there shall be a requirement to serve a fourth serving from the legumes three days a week.

(b) Dairy Group. Includes milk (fluid, evaporated or dry; nonfat, 1% or 2% reduced fat, etc.); cheese (cottage, cheddar, etc.); yogurt; ice cream or ice milk; and pudding. A serving is equivalent to 8 oz. of fluid milk and provides at least 250 mg. of calcium. All milk shall be pasteurized and fortified with Vitamins A and D. The daily requirement is three servings. For persons 15-17 years of age, or pregnant and lactating women, the requirement is four servings. One serving can be from a calcium-fortified food containing at least 250 mg. of calcium.

(c) Vegetable-Fruit Group. Includes fresh, frozen, dried and canned vegetables and fruits. One serving equals: 1/2 cup vegetable or fruit; 6 ounces of 100%

Not only is the policy of the jail and the U.S. Marshal's illegal but it is at odds with the basic reality of today's enlightened society. Indeed, Mr. McDavid's dietary needs are not in any way out of step with the present knowledge of medical science and also with accepted norms of behavior. Specifically, the attached Declaration of Mark J. Reichel sets forth the numerous health professionals, celebrities, politicians, intellectuals, world leaders, artists and others who are Vegan. Quite simply, from Jerry Seinfeld to the late and great Corretta Scott King: if they were arrested in Sacramento, they'd be on a hunger strike and eventually starve to death.

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juice; 1 medium apple, orange, banana, or potato; 1/2 grapefruit; or 1/4 cup dried fruit. The daily requirement of fruits and vegetables shall be five servings. At least one serving shall be from each of the following three categories:

(1) One serving of a fresh fruit or vegetable.

(2) One serving of a Vitamin C source containing 30 mg. or more.

(3) One serving of a Vitamin A source, fruit or vegetable, containing 200 micrograms Retional Equivalents (RE) or more.

(d) Grain Group. Includes bread, rolls, pancakes, sweet rolls, ready-to-eat cereals, cooked cereals, corn bread, pasta, rice, tortillas, etc. and any food item containing whole or enriched grains. At least three servings from this group must be made with some whole grains. The daily requirements shall be a minimum of six servings.

The following bread-cereal products meet the partial or whole grain requirement:
oatmeal whole wheat bread
pumpernickel bread corn tortilla
whole wheat rolls whole grain hot cereal
whole wheat flour grits
tortilla whole grain pancakes
whole grain bagels, and waffles
muffins, and crackers
whole grain ready-to- eat cereal

Providing only the minimum servings outlined in this regulation is not sufficient to meet the inmates' caloric requirements. Additional servings from the dairy, vegetable-fruit, and bread-cereal groups must be provided in amounts to meet caloric requirements. In keeping with chronic disease prevention goals, total dietary fat should not exceed 30 percent of total calories on a weekly basis. Fat shall be added only in minimum amounts necessary to make the diet palatable.

Defendant McDavid would gladly take the dietary requirements of convicted inmates if offered; this exceeds what he is getting now.

McDavid's First Amendment Right to a Vegan diet is being violated. The violation of that right is illegal in and of itself, but it also transforms his further detention in that jail into punishment in violation of the Bail Reform Act, and the Fourth, Fifth, Eighth and Fourteenth Amendments to the Constitution. What is of paramount importance in the present discussion is that McDavid is a *pretrial detainee*, unlike all other inmates in the suits reported herein in the case law where the inmates were *convicted* inmates.

The other substandard conditions of confinement obviously bear on detention decisions as well and compel his release on the terms he has offered the court.

Exercise. There is substantial agreement among the case law in this area that regular outdoor exercise is essential to the psychological and physical well being of inmates. Frazier v. Ward, 426 F. Supp. 1354, 1367-69 (N.D.N.Y.1977); Rhem v. Malcolm, 389 F. Supp. 964, 972 (S.D.N.Y.), Aff'd on other grounds, 527 F.2d 1041 (2d Cir. 1975); Hamilton v. Landrieu, 351 F. Supp. 549, 550 (E.D.La.1972); Taylor v. Sterrett, 344 F. Supp. 411, 420 (N.D.Tex.1972).

In line with the teachings of Jones v. Blanas, supra, regular outdoor exercise for inmates, within this Circuit, cannot be denied in the fashion it has been to Mr. McDavid without that being considered punitive. He is being punished with complete impunity by the Sacramento County Jail in this regard; this court must step in especially as it regards the Bail Reform Act being unconstitutional as applied to this defendant. This rule is long held. In Allen v. Sakai, 48 F.3d 1082 (9th Cir. 1994) a civil rights suit by convicted inmates alleging depravation of outdoor exercise, this Circuit found

> Smith alleges that the defendants violated his right to freedom from cruel and unusual punishment by depriving him of adequate outdoor exercise. Phase I inmates were confined to their cells almost twenty-four hours per day. Although prison officials assert HHSF had a goal of providing Phase I inmates with five hours of access per week to the facility's outdoor recreation area, they admit that during a six-week period Smith was permitted outside of his cell for outdoor recreation only 45 minutes per week.
>
> An Eighth Amendment claim that a prison official has deprived inmates

> of humane conditions of confinement must meet two requirements, one objective and one subjective. Farmer v. Brennan, ___ U.S. ___, 114 S. Ct. 1970, 1977 (1994). Under the objective requirement, the prison official's acts or omissions must deprive an inmate of 'the minimal civilized measure of life's necessities.'... The subjective requirement, relating to the defendant's state of mind, requires deliberate indifference. ...
>
> We conclude that Smith has met the objective element of the Eighth Amendment analysis by alleging the deprivation of a basic human need. Before the period in question, several circuits, including this one, had held that deprivation of outdoor exercise could constitute cruel and unusual punishment...This court recognized in Spain that 'some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates.' We emphasized that the plaintiffs were in long-term incarceration where they were in continuous segregation, generally spending twenty-four hours each day alone in their cells. Id. Under those conditions, deprivation of outdoor exercise constituted cruel and unusual punishment.

Id at p. 1087.

In summary, defendant is a pretrial detainee. He is entitled to more Constitutional protections than convicted inmates. He may not be punished. Despite this, he is held in the T-Sep at the jail, a regime much more onerous and depraved than that of convicted inmates. Purgatory is worse than hell for Mr. McDavid.[21] He is denied vegan meals, and is denied regular outdoor exercise. This Circuit recently instructed that the Fourteenth Amendment requires the government to do more than provide the minimal civilized measure of life's necessities for non-convicted detainees. Jones v. Blanas . McDavid's conditions at the jail render his continued detention there a violation of his many Constitutional rights and result in the Bail Reform Act being unconstitutional as applied in this case.

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[21] See this quote in Jones v. Blanas, supra,

> In addition to comparing the conditions of confinement of pre-adjudication civil detainees to those of pre-trial criminal detainees, it is also relevant to compare confinement conditions of civil detainees pre-adjudication to conditions post-commitment. As the Eleventh Circuit has persuasively reasoned, 'if pretrial detainees cannot be punished because they have not yet been convicted, [citing Bell], then [civil] detainees cannot be subjected to conditions of confinement substantially worse than they would face upon commitment.' Lynch, 744 F.2d at 1461. Or, to put it more colorfully, *purgatory cannot be worse than hell*. Therefore when an individual awaiting SVPA adjudication is detained under conditions more restrictive than those the individual would face following SVPA commitment, we presume the treatment is punitive.

Id at p. 932 (Italics added.)

Bail cannot be denied in this "type" of case.

In this case, the allegations in the criminal complaint are that the conspirators desired to make an illegal incendiary device for use at one of at least three targets. The targets were not clear, nor was the timing, let alone what type of device was to be made. Nevertheless, that is the fleshed out conspiracy in the complaint. The indictment is more vague.

In this district alone, there have been defendants who are charged with actually making and then using an explosive device to burn structures where people live, claiming responsibility for the bombing as "ELF" members, who are then released in to the community on bail even after they have plead guilty. (See the Criminal Complaint filed March 7, 2005 in Eastern District Docket Mag 05-063 PAN for all 3 defendants: Eva Holland, Lili Holland, and Jeremiah Colcleasure). The complaint alleges that all 3 conspired to violate 844 (n), all 3 are members of ELF, that all 3 created multiple firebombs, and that all 3 put these firebombs at new home developments in Lincoln, CA., and Auburn, CA., and in Sutter Creek, Ca., with the 7 bombs in Sutter Creek igniting a fire of an occupied apartment complex there. All of the various sites had graffiti spray painted with ominous threats and warnings to "disarm or die," "enjoy the world as long as you can" and "U Will pay."

The crimes as alleged in the complaint against the Hollands and Colcleasure were (i) completed, (ii) very advanced, (iii) very extensive (iv) aimed at persons, among other things. Despite this, these young people were released on bail pre trial. Colcleasure was released by Magistrate Judge Mueller the day of his arraignment, over government opposition and upon $150,000 secured bail and 3rd party custody. Colcleasure was originally released on an unsecured bond, to be replaced by a secured bond within a number of days. (March 7, 2005 Minutes in Docket Mag 05-063 PAN). Colcleasure is awaiting trial at present, out of custody. 3 days later at their arraignment, after pleading not guilty, both of the Hollands were also released upon an unsecured appearance bond and 3rd party custody; the

unsecured bond was soon to be replaced by a secured bond in the amount of $300,000. (Minutes of March 10, 2005 arraignment, Docket Cr-S-05-0083 EJG-2.) Eva and Lili Holland then plead guilty to these violent acts on October 14, 2005 and were continued on release in the community.(Minutes of October 14, 2005 Docket Cr-S-05-0083 EJG-3.)

Here is an example from another "Eastern District." In USA v. Ali Al-Tamimi, 04-385 LMB, defendant Tamimi was indicted in the Eastern District of Virginia upon federal charges of providing material aid to Al Qaeda and the Taliban in Afghanistan. The case received international attention and was the subject of numerous national press conferences by federal law enforcement. Tamimi, a lecturer and religious leader, was accused by the government of inciting, encouraging and supporting all Muslims in their efforts to join jihad against the United States and to bring the war home to the states as well. The government alleged he was the mastermind of the "Virginia Jihad." He was eventually convicted of all of that, and sentenced to a term of excess than life, primarily because of the deaths involved in the wars overseas. What is important is that the docket in the case reflects that Tamimi appeared On September 24, 2004, was arraigned, and released by the court (without opposition by the government) upon $75,000 secured bond and PTS Supervision.(Docket Minutes of September 24, 2004.) Tamimi was allowed to remain free post verdict and until the date of sentencing.

As such, a defendant such as McDavid is entitled to release when he has satisfied the commands of the Bail Reform Act.

DATED: March 1, 2006

Respectfully submitted,

MARK J. REICHEL
Attorney At Law