

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED

MAY 28 AM 10:03

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 8:03-cr-77-T-30TBM

SAMI AL-ARIAN and
SAMEEH HAMMOUDEH,

Defendants.

ORDER

THIS CAUSE is before the court on Defendant Sami Al-Arian's **Motion to Modify Conditions of Detention** (Doc. 92) and Defendant Sameeh Hammoudeh's **Motion to Modify Conditions of Detention** (Doc. 93). Additionally before the court is an *in camera* motion for view by the court filed on behalf of Mr. Al-Arian. Mr. Al-Arian's motions are supplemented by three affidavits filed by Patrick D. Doherty, Esquire (Docs. 100, 121, 124).¹

By their motions, the Defendants complain of their pretrial detention at FCC Coleman.² More particularly, they complain that the facility is located at a distance of 70 miles from Tampa and that such distance presents a hardship for counsel. Additionally they complain of visitation procedures that are cumbersome and time consuming, thus limiting the available time for actually speaking with their clients after arrival and screening at the facility. They

¹In addition, the court has received a number of unsolicited letters from citizens expressing concern about the Defendants' confinement.

²The record reveals that upon their arrest these Defendants were held in the local Hillsborough County jail. At the conclusion of their bail/detention hearing, they were transferred to FCC Coleman at the discretion of the United States Marshal.

140

also complain that the prison does not allow introduction of recording devices or computer equipment and predict that future discussions with their clients about the discovery in this cause will be hindered. According to counsel, the entire scheme for attorney visitation is inconsistent with “the reasonable opportunity for private consultation with counsel as required by 18 U.S.C. § 3142(i)(3).” In his supporting affidavits, Mr. Doherty urges that the difficulties experienced at Coleman regarding client visitation are no mere accidents, but deliberate attempts by employees of the Department of Justice to give the Attorney General a substantial and unfair advantage by preventing these defendants from consulting with counsel in violation of their Sixth Amendment rights. In addition to the written motions, the court has fielded complaints by counsel during two recent hearings. Counsel complain that the Defendants are confined to a small cell twenty-three hours per day, being allowed recreation only one hour, four days a week. They also complain that such recreation is in a small outdoor cage without the benefit of any recreation equipment. They further complain that family visitations are on a non-contact basis only and that, prior to and subsequent to such family visitations, the Defendants are strip-searched, despite the non-contact nature of the visit.

Insofar as Mr. Al-Arian requests the court to conduct an *in camera* view of the facilities at FCC Coleman, the motion is **DENIED** as moot. The court has visited Coleman and examined each aspect of the facility as it relates to the Defendants’ complaints. The visit confirms that the Defendants are housed in the Special Housing Unit (hereafter “SHU”) at the high security facility of the penitentiary. This unit is used for administrative and disciplinary detention purposes and it houses inmates with disciplinary problems or other special needs,

such as protective custody. It is also used to house pre-trial detainees in accordance with regulations of the Bureau of Prisons.

The Defendants' confinement in the SHU does result in an alteration of their privileges. Thus, individuals in this unit are confined to their cell when not otherwise at recreation, visiting the law library, participating in visitation, or engaged in some other authorized activity. While in their cells, Defendants are permitted radios as well as reading material, including discovery material. The cells include bunk beds, a sink, toilet, shower, and small metal desk. Recreation is permitted five times per week, one hour per day. Recreation does not occur in the open recreation yard, but instead in open air cages adjacent to the SHU wing.³ Recreational equipment is not provided to inmates in the SHU facility. Family visitation is conducted in accordance with the schedule established at the institution. The Defendants' visitations are non-contact and conducted through clear glass in a small visitation room. The Defendants are subjected to a strip search prior to and subsequent to such visitations. Attorney-client visits are conducted in small conference rooms immediately adjacent to the visitation area. The facility has requested that the attorneys follow a specific procedure scheduling their appointments ahead of time. Despite using this procedure, it appears that on more than one occasion, the lawyers have been delayed in seeing their clients after arrival and check-in at the facility. The facility itself is a relatively new federal penitentiary located approximately one hour driving time from the Tampa district court. The

³This recreation area is walled on four sides and open above. The top is, however, covered with an opaque covering to keep out the weather. Numerous small exercise cages are built inside this area.

facility is well staffed, well maintained, and very clean. Inmate activities and their movement about the facility is highly regimented.

Insofar as the Defendants seek an order of the court directing the United States Marshal to relocate them to alternative pretrial detention facilities, the motions are **DENIED** without prejudice. The Defendants have failed to demonstrate that the conditions of their confinement fall below minimum constitutional standards for pretrial detainees. Constitutional questions regarding the conditions of confinement of pretrial detainees are properly addressed under the due process clause of the Fourteenth Amendment, and the relevant inquiry is whether the confinement conditions amount to punishment of the detainee. Wilson v. Blankenship, 163 F.3d 1284, 1291 (11th Cir. 1998) (quoting Bell v. Wolfish, 441 U.S. 520, 535 & n. 16 (1979)). In analyzing the complained of confinement condition, the court must determine whether the detention officials intentionally imposed the restriction for a punitive purpose or whether it is reasonably incidental to a legitimate government objective.⁴ Bell, 441 U.S. at 538-39. The pretrial detainee's complaints are evaluated against the totality of confinement conditions to determine if there is a constitutional deficiency. Wilson, 163 F.3d at 1292 (citing Hamm v. DeKalb Co., 774 F.2d 1567, 1575-76 (11th Cir. 1985)).

⁴“Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].’” Bell, 441 U.S. at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). Thus, a condition or restriction of pretrial detention that is reasonably related to a legitimate governmental objective does not amount to punishment. On the other hand, if a condition or restriction is not reasonably related to a legitimate goal, i.e., if it is arbitrary or purposeless, a court reasonably may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees. Id. at 538-39

The placement of pretrial detainees in special housing units, such as that at Coleman, is contemplated by the federal regulations. See 28 C.F.R. § 541.22(a)(3); see also Bureau of Prisons (hereafter “BOP”) policy statement no. 5270.07, ch. 9 (Aug. 20, 1993). Within the penitentiary, such confinement provides a means for separating pretrial detainees from the general prison population and ostensibly enhancing their personal safety. Here, officials at Coleman express considerable concern for these individuals’ personal safety and have acted to segregate them as much as possible from the convicted inmates. This consideration and the fact that the Defendants appear to be the only pretrial detainees in the facility result in a considerable degree of isolation from the other inmates. However, this is not demonstrated to be unlawful. Further, the cell in which these Defendants are housed, while not spacious, is more than adequate to meet constitutional minimums. As noted, the cells are adequately furnished and very clean. The Defendants are provided a change of linens and laundry regularly and have access to a shower at any time. In addition to radios, inmates may receive mail, including magazines and newspapers, in their cells and may keep a reasonable amount of legal material including tangible discovery in the cell as well. At present, they are being provided cassette players in their cell to assist in listening to intercepted conversations provided as discovery.

At this point, there is no basis to conclude that the Defendants will not have an adequate opportunity to review the voluminous discovery in this case. Equipment necessary for review of the intercepted communications or for viewing videos seized in the searches will be provided as needed. At the court’s request, a videoconferencing unit has been installed in

the visitation area of the facility. This unit will be available to counsel for conferences with their client if they wish to avail themselves of it for discussions about discovery.

The matter of non-contact visitation is not peculiar to the housing of pretrial detainees at Coleman, but in fact is the general rule of the United States Marshal in this district. Courts considering such limitations have upheld prohibitions against contact visits. See Block v. Rutherford, 468 U.S. 576, 589 (1984) (upholding a blanket prohibition against contact visitation for pretrial detainees at a county jail); Feeley v. Sampson, 570 F.2d 364, 373 (1st Cir. 1978) (holding that rights of pretrial detainees not violated by ban on contact visits); Jones v. Diamond, 594 F.2d 997, 1013 (5th Cir. 1979) (holding that, while pretrial detainees have right to reasonable visitation, that does not necessarily include contact visitation). Thus, this restriction, while no doubt difficult on the Defendants and their families, does not violate minimal standards and would in no event be lifted were the Defendants moved to a different detention facility.

As for the strip searches that precede and follow non-contact visits, the court finds no real justification for such procedure. Ostensibly, such searches are done as a matter of security. However, given the highly regimented manner in which items may be introduced into these Defendants' cell and given that these Defendants are not allowed contact with other inmates or their visitors, there appears to be no basis for such an invasive procedure before and after non-contact visits. Cf. Bell, 441 U.S. at 558-60 (upholding federal prison's policy that required visual body inspections of pretrial inmates after every contact visit in light of the nature of the visit coupled with contraband concerns); Skurstenis v. Jones, 236 F.3d 678, 682 (11th Cir. 2000)(holding that jail policy requiring inmates to be strip-searched before being

placed in cell or detention room did not comport with the Fourth Amendment in absence of any reasonable suspicion of facts supporting intrusion); but see Hay v. Waldron, 834 F.2d 481, 483-86 (5th Cir. 1987) (upholding prison's policy of visual body cavity searches of inmates in administrative segregation each time the inmate enters or leaves his cell). Notably, although the BOP contemplates visual searches of body surfaces and cavities in some instances, see BOP policy statement no. 5521.05, p. 2 (June 30, 1997), the BOP's policy statements do not contemplate this type of search absent a reasonable belief that contraband may be concealed on the inmate or unless there has been a good opportunity for such concealment to have occurred.⁵ Here, the strip searches occur as a matter of routine and not upon any reasonable suspicion justifying such intrusion. Absent such predicate, the mere fact that they are on SHU is inadequate justification for such intrusive searches and appears to violate these Defendants' fourth amendment rights. Before issuing a final order on such searches, the court will permit Warden McKelvy or his authorized representative ten days in which to file a response to these conclusions if he so chooses.⁶

⁵"Staff may conduct a visual search where there is *reasonable* belief that contraband may be concealed on the person, or a good opportunity for concealment has occurred. For example, placement in a SHU, leaving the institution, or re-entry into an institution after contact with the public." BOP policy statement no. 5521.05, p. 2-3. Here, the Defendants have been on SHU for nearly two months. It has never been suggested that either has concealed contraband on his person or in the cell. Given the close scrutiny under which they are held, it does not appear that either has had or will have the opportunity to acquire contraband so as to justify strip searches in accordance with this policy.

⁶Any such response should address why a pat-down search of these Defendants would not be adequate to satisfy any security concerns of the facility.

The matter of recreation afforded these Defendants is less than ideal given the lengthy pretrial period anticipated in this case.⁷ By virtue of their placement in SHU, the Defendants are permitted exercise in a cage adjacent to the cellblock five times each week. As noted above, the exercise cages are enclosed by a high wall and covered by an opaque weather deflector. While there is open air space above the walls, for all practical purposes the Defendants remain indoors. No equipment is provided and the circumstances of their recreation inside these fairly small steel cages when compared to that available to convicted inmates on the nearby large open-air recreation yard stands in stark contrast. Thus, Defendants are correct that because they are on SHU, they have less opportunity for recreation than even the convicted inmates at Coleman. However, despite these circumstances, the Defendants do not demonstrate that their rights are being violated by such limited opportunity for recreation. See 28 C.F.R. § 551.115(d) (noting that exercise afforded pretrial detainees housed in administrative detention may be more restrictive than that provided to other pretrial detainees, and the rules governing such are in the BOP's rules on inmate discipline); see also 28 C.F.R. § 541.21(c)(6) (setting minimal amount of exercise required segregated inmates to no less than five hours each week). Importantly, the Eleventh Circuit has never held that the Constitution requires pretrial detainees to have access to outdoor exercise and recreation. While the former Fifth Circuit initially held that pretrial detainees may not be continuously incarcerated in an institution designed to punish where outdoor recreation is reasonably

⁷Given the volume and nature of the discovery in this case, counsel have suggested the need for a minimum of 18 months to prepare for the trial.

available, see Miller v. Carson, 563 F.2d 741, 749-50 (5th Cir. 1977),⁸ the scope of that holding was later narrowed when the court concluded that indoor exercise and recreation may be an alternative to outdoor recreational facilities absent medical evidence demonstrating a need for outdoor exercise, see Jones, 594 F.2d at 1013. Consequently, a pretrial detainee may not prevail on this issue unless (1) he has been intentionally denied outdoor exercise as punishment, see Bell, 441 U.S. at 538-39; Wilson, 163 F.3d at 1291-92, or (2) if he shows that his long term confinement without exercise may result in serious detriment to his health, see Jones, 594 F.2d at 1013. There is no evidence that Defendants' recreation is any different than that granted other inmates on SHU or that it is intended to punish them. While the court has concerns with the possible effects on both Defendants of such limited recreation during a long-term pretrial period, there is no demonstration, at present, of a serious detriment to their health in the current circumstances.

The matter of attorney-client visitation has been problematic during the early stages of this litigation. Counsel have encountered longer travel time and more cumbersome procedures at Coleman than they are used to in cases typically handled before this court. Counsel complain that they have been subjected to inordinate delays after arriving at the facility despite having followed the procedures prescribed by the facility. However, despite the anecdotal submissions of counsel, the court cannot conclude that the difficulties experienced so far are intended to or are substantial enough to violate of Defendants' sixth

⁸The Eleventh Circuit, in an en banc decision, Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

amendment rights. The court has spoken with the supervisory personnel at Coleman and has received assurances from them that they are aware of the complaints and have taken steps to eliminate unnecessary delays in attorney visitations. These officials have also assisted in the set-up of videoconferencing equipment which is intended to provide counsel an alternative method of speaking with their clients during the pretrial period. The court will continue to monitor this matter.⁹

The denial of these motions is without prejudice.

Done and Ordered in Tampa, Florida, this 28th day of May 2003.



THOMAS B. McCOUN III
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
U.S. Marshal

⁹Despite the inconvenience to counsel, in the peculiar circumstances of this case, it is simply not unreasonable for the facility to request that the lawyers alert them to their visit prior to their arrival so that it may make the necessary arrangements for movement of the inmate. On the other hand, it is likewise not unreasonable for counsel, who follow the requested procedures, to expect that they will have the maximum opportunity to communicate with their clients upon their arrival. In matters such as these, time is money and the court does not wish to see either these Defendants and their attorneys, nor the taxpayers shortchanged by avoidable and costly delays.