UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JONATHAN J. POLLARD,	:	
Petitioner,	:	15-cv-09131-KBF
v.	:	
UNITED STATES PAROLE COMMISSION, J. PATRICIA WILSON SMOOT, solely in her capacity as Chair of the United States Parole Commission, UNITED STATES PROBATION OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, and MICHAEL J. FITZPATRICK, solely in his capacity as Chief U.S. Probation Officer,	:	
Respondents.	:	

MEMORANDUM OF LAW IN SUPPORT OF JONATHAN J. POLLARD'S MOTION TO REOPEN THE CASE AND RENEW HIS PETITION FOR A WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Regulations

Jonathan J. Pollard respectfully submits this memorandum of law in support of his motion ("Motion") to reopen this case and renew his petition for a writ of habeas corpus to challenge the special conditions of parole imposed on him by the United States Parole Commission (the "Commission") by Notice of Action on Appeal dated October 8, 2015, as supplemented by the Commission's Notice of Action dated March 2, 2016 ("Supplemental Notice of Action" or "SNOA") (Lauer Decl. Ex. G).[1]

Preliminary Statement

The Supplemental Notice of Action issued by the Commission fails in every conceivable respect to address the clear mandate of this Court in its Order of December 16, 2015 [Docket No. 26] ("Remand Order"). The Court remanded this proceeding to the Commission specifically to identify whether Mr. Pollard has retained "in his head" secret information that could endanger the public and thereby justify the severity of the special conditions of parole (as defined below, the "Special Conditions") imposed by the Commission. (12/14/15 Tr. at 16). The Court cautioned the Commission against overreliance on evidence of past criminality, urging the Commission to base its statement of reasons on contemporary findings of fact. (*Id*. at 14).

The Commission ignored the Court. Its Supplemental Notice of Action relies almost exclusively on events that occurred over thirty years ago. It disguises the lack of factual basis for the Special Conditions through a series of non-sequitur observations about Mr. Pollard's history – some of them demonstrably incorrect – and fails to draw any logical connection between these alleged facts and the present day restrictions. The purported

[1] Citations to "Lauer Decl." refer to the Declaration of Eliot Lauer, dated April 8, 2016, submitted in support of the Motion.

"justifications" in the Supplemental Notice of Action are so arbitrary and illogical as to reveal what can only be bias and vindictiveness on the part of the Commission.

The Commission's cursory assertions fail to adequately answer the "fundamental issue" informing judicial review of the Special Conditions: whether he possesses secret information in his head that could pose a threat to national security. (*Id.* at 12). And, even assuming *arguendo* that the Commission had made that showing (it did not), the Supplemental Notice of Action then fails to provide any rational, logical connection between the alleged theoretical risk posed by Mr. Pollard and the Special Conditions imposed on him. Because the Commission has set forth no factual basis to justify the imposition of the Special Conditions, the Commission should be ordered to vacate them.

Procedural History

Mr. Pollard was released on "mandatory" parole on November 20, 2015. He served exactly 30 years in prison after pleading guilty to one count of conspiracy to commit espionage without intent to harm the United States. Mr. Pollard had delivered classified information to the State of Israel in 1984 and 1985.

A. Imposition of the Special Conditions

Before releasing Mr. Pollard on mandatory parole, the Commission was required by U.S. statute and federal regulation to make two determinations: (1) that Mr. Pollard had not seriously or frequently violated the rules and regulations of his penal institution during his thirty-year term of incarceration; and (2) that there was no reasonable probability that upon release Mr. Pollard would commit any federal, state or local crime. The Commission made both determinations in Mr. Pollard's favor, as it granted release on parole.

Nonetheless, pursuant to the Commission's Notice of Action dated July 28, 2015, as amended by its Notice of Action on Appeal dated October 8, 2015 [Docket No. 3 at Ex. G],

the Commission subjected Mr. Pollard to three special conditions of parole, in addition to the conditions expressly mandated by 18 U.S.C. § 4209(a). Those special conditions were: (i) 24-hour GPS monitoring of his person (the "GPS Monitoring Condition"); (ii) monitoring of his computer use both at home and at his place of employment (the "Computer Monitoring Condition"); and (iii) a curfew that, as implemented by the United States Probation Office for the Southern District of New York, required him to be at home from 7 p.m. to 7 a.m with limited exceptions (collectively, the "Special Conditions").

B. Mr. Pollard's Habeas Challenge and the Court's Remand to the Commission

Mr. Pollard commenced this habeas proceeding on November 20, 2015, immediately upon his release, to challenge the Special Conditions on the grounds that they were unsupported by the requisite statutory and regulatory factors, and, with regard to the GPS Monitoring Condition and curfew, impermissibly burdened Mr. Pollard's right to observe the Jewish Sabbath, as protected by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1. (*See* Amended Petition, Docket No. 11-1).

Following briefing by the parties, the Court held a hearing on December 14, 2015. On December 16, 2015, the Court issued the Remand Order directing the Commission to make findings of fact in order to justify the Special Conditions, because the existing record of the Commission's reasons was "insufficient to support the nature and the breath of the restrictions." (12/14/15 Tr. at 12).

Specifically, the Court identified the "fundamental issue" informing a review of the Special Conditions to be "the question as to whether there is anything that Mr. Pollard can disclose that would endanger the public." (*Id.*). The Court observed that it was unclear what the broad restrictions were intended to accomplish "[i]n the absence of factual determination as to some danger based on what Mr. Pollard still knows, if anything, that would be of current use to a

foreign government." (*Id.* at 16). The Court directed the Commission to make findings of fact as to whether there is "secret information in Mr. Pollard's head that they are aware of or have reason to believe exists." (*Id.* at 21).

The Court specifically cautioned the Commission that it could not rely exclusively on Mr. Pollard's criminal history, explaining that "the very fact that Mr. Pollard committed such an egregious crime against the state itself demonstrates a level of criminality at a much earlier point in time, which may justify a certain amount of ongoing monitoring, but it has to be . . . brought forward to justify and support the very severe broad restrictions" the Commission had imposed. (*Id.* at 14). Similarly, the Court noted that while it understood that Mr. Pollard's "crime involved covert means, as the [C]omission stated . . . that is as to a past fact, and it is unclear how that relates to protection of the public welfare or any other sentencing factor currently." (*Id.* at 16-17). Finally, it specifically instructed the Commission to "pay particular attention to 28 CFR section 2.40 and the language therein" when developing the factual basis for its statement of reasons.

C. <u>The Commission's Post-Hearing Deliberations</u>

On January 6, 2016, the Commission (through its counsel) notified Mr. Pollard (through his counsel) that the Commission had reopened Mr. Pollard's matter under 28 C.F.R. § 2.28(a), and invited Mr. Pollard to submit additional materials for its consideration. In a reply sent the same day, Mr. Pollard's counsel asked the Commission to provide any documents it intended to rely upon which had not previously been shared with him. (Lauer Decl. ¶ 4).

The Commission advised that, in addition to the materials it had considered in connection with Mr. Pollard's mandatory parole hearing, it planned to rely on three letters from government officials in an attempt to develop the factual record pursuant to the Remand Order. First, on January 11, 2016, the Commission forwarded to counsel a letter from United States

Congressmen Jerrold Nadler and Eliot Engel, dated November 13, 2015, and addressed to the Attorney General (the "Nadler/Engel Letter"). (Lauer Decl. Ex. A). The same day, the Commission advised that it would also consider a letter written 21 years ago by William O. Studeman, then Acting Director of the CIA (the "Studeman Letter"), who advocated against the early release of Mr. Pollard in 1995 even though Mr. Pollard had not sought parole at that time. (Lauer Decl. Ex. B). Finally, on February 11, 2016, the Commission forwarded a letter from the Director of National Intelligence, James R. Clapper, addressed to the Chair of the Commission (the "Clapper Letter"). (Lauer Decl. Ex. D).

Mr. Pollard submitted a memorandum to the Commission addressing both the Nadler/Engel Letter and the Studeman Letter on January 15, 2016, and a supplemental memorandum in response to the Clapper Letter on February 18, 2016. (Lauer Decl. Ex. C, E).

Due to the Commission's failure to publish its findings of fact in a timely manner, on March 9, 2016, Mr. Pollard filed a motion for a writ of mandamus to compel the Commission to do so. [Docket No. 30]. By letter dated March 10, 2016, the Commission responded that it had issued the Supplemental Notice of Action repeating the Special Conditions on March 2, 2016, but had failed to inform Mr. Pollard or his counsel due to an "administrative error." (Lauer Decl. ¶¶ 10-11). Mr. Pollard withdrew the motion for a writ of mandamus without prejudice. [Docket No. 34].

D. <u>The Supplemental Notice of Action's "Findings of Fact"</u>

The Supplemental Notice of Action was supposed to provide the "findings of fact" this Court found wanting from the Commission's prior Notices of Action, but is instead a series of disjointed observations about events that occurred 30 years ago, and unsubstantiated *ipse dixit* statements of U.S. officials.

1. *Facts Purporting to Justify the GPS Monitoring Condition and Curfew*

In an effort to justify the imposition of the GPS Monitoring Condition and curfew, the Commission cites Mr. Pollard's attempt to seek asylum at the Israeli Embassy on the day of his arrest by American authorities – *which occurred in 1985*. (SNOA at 1). The Commission relies upon Mr. Pollard's crime itself, claiming that his "base offense of espionage was by definition an exercise in deception and furtive movements that included trips abroad and a false identity of 'Danny Cohen.'" (SNOA at 2). These events occurred *in 1984 and 1985*. The Commission then claims that Mr. Pollard has "demonstrated pervasive efforts to provide classified information to multiple sources in various foreign nations," *i.e., prior to 1985*. (SNOA at 2). Finally, it suggests that Mr. Pollard has "a propensity to violate the terms of the plea agreement and/or an order of the sentencing court" on the basis of Mr. Pollard's single violation of "a gag order issued by a Federal Appeals Court Judge by revealing information about [his] criminal case to a television journalist" – which event occurred *prior to his sentencing in March 1987*, and was addressed by the sentencing court.

The only modern "facts" the Commission relies upon in support of the GPS Monitoring Condition are two recent statements by persons others than Mr. Pollard, to the effect that, at 61 years of age, Mr. Pollard would like to live Israel. *First*, the Commission points to the Nadler/Engel Letter, in which the Congressmen advocate to the Attorney General to give "fair consideration" to Mr. Pollard's request that he be given permission to live with his wife in Israel. According to the Commission, that "proposition is in clear contradiction to the order of the sentencing court that [Mr. Pollard] be sentenced to the custody of the Attorney General for life and the parole certificate that [he] signed prior to your release indicating an understanding that [he] will not be able to leave the district of release without prior approval of [his] U.S. Probation Officer." The Commission provides no explanation for how this perfectly lawful request to the

Attorney General by two U.S. Congressmen in any way conflicts with the order of the sentencing court or the parole certificate that Mr. Pollard signed.

Second, the Commission points to a statement by Jay Bratt of the National Security Section of the U.S. Attorney's Office in Washington D.C., expressing a "concern" at Mr. Pollard's 2014 parole hearing that Mr. Pollard would flee the country upon his release. The Commission provides no factual support for this unsubstantiated "concern," and ignores the fact that Mr. Bratt's colleagues, at Mr. Pollard's parole hearing one year later in 2015 (at which parole was granted), expressed no such concerns.

Finally, the Commission attempts to justify the Special Conditions on the ground that some of the information Mr. Pollard compromised "remains classified at the Top Secret and Secret levels, and future unauthorized disclosure of the information could risk harm to the national security of the United States." (SNOA at 2, 4 (citing the Clapper Letter)).[2] The Commission does not provide any findings of fact with regard to the nature of the information (e.g., satellite images, vessel or troop locations), or whether Mr. Pollard could possibly have retained details of such information in his head for 30 years in a way that could be disclosed and/or useful to anyone.

Yet, on the basis of these "fact findings," the Commission concludes that Mr. Pollard has "a history of deception and an expressed desire to leave the country," which purportedly thus justifies the GPS device "to monitor [Mr. Pollard's] activity for the purposes of

[2] The Clapper Letter contains the erroneous statement that "Mr. Pollard has previously admitted to violating the Espionage Act by disclosing classified information against the interests of the United States Government." (Lauer Decl. Ex. D). Mr. Pollard was not charged with, and did not admit to, acting against the interests of the United States or its government. Mr. Pollard was charged under the alternative prong of the Espionage Act — giving an advantage to Israel. *See* 18 U.S.C. § 794(a) ("Whoever, with intent or reason to believe that it is to be used to the injury of the United States *or to the advantage of a foreign nation*, communicates, delivers, or transmits…."); *see also* Indictment ¶ 15 [Docket 3 at Ex. 3] (charging Mr. Pollard with membership in a conspiracy to transmit information to foreign agents with "reason to believe that the same would be used *to the advantage of Israel*.") (emphases added).

minimizing the risk that [he] will flee the country and engage in further criminal acts." The Commission asserts that "GPS monitoring will allow for location tracking to determine if there is further deception and/or unauthorized travel."

2. *Facts Purporting to Justify the Computer Monitoring Condition*

The Commission seeks to justify the Computer Monitoring Condition as an effort to "minimize the risk" that Mr. Pollard will "disclos[e] classified information to unauthorized sources" and to monitor Mr. Pollard's compliance with his 1985 plea agreement, which calls for pre-publication review of any books or articles Mr. Pollard might wish to write about pre-1985 events. (SNOA at 3).

To support these purported concerns, the Commission points again to the gag order violation in 1985, and to the fact that the information Mr. Pollard came into contact with in 1985 remains classified (SNOA at 3). The Commission relies on the 1995 Studeman Letter for the misleading assertion that Mr. Pollard, *prior to 1995*, sent "at least 14 letters that contained classified information" during his prison term. At that time, Mr. Pollard, in solitary confinement, was correctly proceeding in accordance with the program developed by the government, and was dutifully following the Navy censor procedures pursuant to which the Navy Intelligence censors would redact any sensitive information. Mr. Pollard was never charged or disciplined in any way for any infraction regarding the letters he sent from prison precisely because his conduct was perfectly consistent with the procedures developed by the government. Indeed, as the Commission noted at Mr. Pollard's mandatory parole hearing, Mr. Pollard was a model inmate with an outstanding prison record. (Lauer Decl. Ex. H). Had Mr. Pollard in fact violated the law, prison regulations, and his plea agreement by disclosing confidential information while incarcerated, the government could have used such violations to oppose his release on mandatory

parole — it did not. To the contrary, the government acknowledged that he did not have any material infractions throughout his 30 years of incarceration.

In its one attempt to reference a contemporary fact in support of the Computer Monitoring Condition, the Commission states cynically and falsely that Mr. Pollard "demonstrated a recent propensity to dissemble" because, at his parole hearing, he represented that would be employed upon his release by a particular employer. (SNOA at 4). As the Commission knows well, however, Mr. Pollard was entirely truthful at the hearing. He deferred his employment *after* the hearing, after the Commission announced the Computer Monitoring Condition, because he cannot in good faith ask an employer to subject its computer network to unlimited monitoring by the government as a condition of hiring him. (Lauer Decl. ¶ 12; *see also* Reply Memorandum in Support of Petition, at 3 [Docket No. 25]). As set forth in the Lauer Declaration, that offer of employment remains open to Mr. Pollard, and he will be able to start employment as soon as the Computer Monitoring Condition is removed.

ARGUMENT

I. THE "FACTS" OF THE SUPPLEMENTAL NOTICE OF ACTION FAIL TO JUSTIFY THE SPECIAL CONDITIONS UNDER THE PAROLE STATUTE

28 C.F.R. § 2.40(b), which derives authority from 18 U.S.C. § 4209(a), authorizes the Commission to impose special conditions of parole only if "imposing the condition is reasonably related to the nature and circumstances of [the parolee's] offense or … history and characteristics, and at least one of the following purposes of criminal sentencing: The need to deter [the parolee] from criminal conduct; protection of the public from further crimes; or the need to provide [the parolee] with training or correctional treatment or medical care." In choosing a condition to add to those mandated by statute, the Commission is required to consider "whether the condition involves no greater deprivation of liberty than is reasonably

necessary for the purposes of deterrence of criminal conduct, protection of the public from crime and offender rehabilitation." *Id.*

The factual basis for the Special Conditions, as articulated in the Supplemental Notice of Action, fails to demonstrate any *reasonable relationship* between the Special Conditions and the purposes of criminal sentencing. Instead, the "facts" the Commission has ginned up in response to the Remand Order are dated, irrelevant, or totally unreliable. But, even if the Commission had made a credible showing that Mr. Pollard is presently in possession of information that could cause public harm if released – as the Court instructed was the fundamental issue on remand – the Commission still had to rationally justify how the Special Conditions meet that alleged risk. The Commission has not done that either.

A. The Commission Has Not Even Attempted to Show that Mr. Pollard Could Possibly Remember Something of Intelligence Value from 30 Years Ago

The Commission attempts to justify the Special Conditions on the grounds that the information Mr. Pollard compromised in 1984-1985 remains classified at the Top Secret and Secret levels. (SNOA at 2, 4). The Commission does not, however, elaborate on the general nature of the classified information or set forth any evidence that Mr. Pollard has managed to retain it in his head. The fact that some information might still be "classified" has no bearing on whether Mr. Pollard in fact has such information in his head, or even that it is of such a nature that it would be of any value to anyone in the absence of the physical documents themselves.

It is undisputed that Mr. Pollard does not have any classified documents in his possession, and the only information he could possibly disclose is anything he might have retained in his head from over 30 years ago. The Commission has offered no fact finding to suggest that Mr. Pollard studied in detail the voluminous documents he delivered, or that he remembers their contents to this day. Mr. Pollard's unlawful activity involved identifying large

piles of hard copy documents such as intelligence publications and satellite photographs by topic, physically removing them from a government agency building in a suitcase, handing the suitcase to an Israeli government representative for photocopying, and later returning the suitcase to the government building. (*See* Indictment at ¶¶ 19-21, *United States v. Pollard*, No. 86 Cr. 0207 (D.D.C. June 4, 1986), Docket No. 3 at Ex. A). This activity occurred approximately three times a week. *Id*. at ¶ 20. Thus, over the course of two years, Mr. Pollard may have selected and delivered thousands of complex and lengthy documents. It is inconceivable that anyone could memorize the details of such documents at the time of disclosure, let alone thirty years later.

It is implausible to suggest that Mr. Pollard has been able to preserve any meaningful details from the thousands of documents he reviewed only cursorily 30 years ago. Even if he still remembers some general ideas from the documents, such information has no value without the actual images, numbers, or texts themselves. The information that remains "classified" could very well be detailed maps, satellite images, or other documents that are only useful in their physical form, rather than vague ideas and concepts that one could retain over the course of 30 years. The Commission fails to provide any factual support for its suggestion that the "classified" information is of a sort that could possibly be retained 30 years later, such that it would be of any use to anyone today.

Nor does the Commission explain how either of the Specials Conditions would serve to mitigate the risk of additional unauthorized disclosures, even if such disclosures were theoretically possible. As this Court noted, "it would seem that if the issue is simply dissemination of additional secret information, that could be accomplished in one's kitchen or office in a meeting at home without the need for flight." (12/14/15 Tr. at 16). If the government truly believed there was *any possibility* that Mr. Pollard had information that could harm the

United States or its interests, he would be restricted or monitored in his physical movements and at home, and limited in his ability to use the phone or mails. Monitoring his movements by GPS fails to address the theoretical risks in any rational way; it merely allows his parole officer (if he is watching) to follow a blip on a screen move around the Southern District. Similarly, there is no rational basis for monitoring his computer use when he is free to speak to anyone at any time at any place, with the exception of a few embassy buildings and airports. The government's inconsistency is the best evidence of just how arbitrary these restrictions are.

B. Mr. Pollard's Conduct of 30 Years Ago Cannot Justify the Special Conditions Imposed Upon Him Today

In its attempt to justify the imposition of the Special Conditions, the Commission relies primarily upon historical events of 30 years ago, in direct contravention of this Court's instruction to "bring forward" its justifications. (12/14/15 Tr. at 14). As the Court observed, the nature of Mr. Pollard's crime is "as to a past fact, and it is unclear how that relates to protection of the public welfare or any other sentencing factor currently." (*Id.* at 16-17).

The Commission states in the Supplemental Notice of Action that Mr. Pollard has "a propensity to violate the terms of the plea agreement and/or an order of the sentencing court" on the basis of Mr. Pollard's single violation of a gag order in 1986, points to his 1985 attempt to seek asylum at the Israeli Embassy, and his alleged "pervasive efforts to provide classified information to multiple sources in various foreign nations," which occurred before Mr. Pollard was even arrested. The Commission similarly relies upon the deceptive nature of Mr. Pollard's crime. None of these 30 year old events has any bearing on Mr. Pollard's *current* propensity to violate the law and cannot provide the factual basis for the Special Conditions.

C. The GPS Monitoring Condition and Curfew Cannot be Justified By Mr. Pollard's Expressed Wish to be in Israel Lawfully

The Commission states that the GPS Monitoring Condition and curfew are necessary "to monitor [Mr. Pollard's] activity for the purposes of minimizing the risk that [he] will flee the country and engage in further criminal acts." It claims that Mr. Pollard has "a history of deception and an expressed desire to leave the country," and that "GPS monitoring will allow for location tracking to determine if there is further deception and/or unauthorized travel." (SNOA at 1).

To substantiate its unfounded assertion that Mr. Pollard is a "flight risk," the Commission relies on the Nadler/Engel Letter, in which the Congressmen express to the Attorney General Mr. Pollard's desire to move to Israel *in compliance with U.S. law*.

The Commission's distorted reliance on the Nadler/Engel Letter is proof of how vindictive and biased this proceeding has become toward Mr. Pollard. It is grossly unfair – and unconstitutionally retaliatory – to suggest that because two United States Congressmen wrote to the Attorney General expressing *their* understanding that Mr. Pollard would want to move to Israel in a perfectly lawful manner, Mr. Pollard therefore demonstrates a propensity to *unlawfully* violate the terms of his release.

Mr. Pollard has not concealed that he wishes to live in Israel. He stated it expressly to the Commission on remand. (Lauer Decl. Ex. C at p. 10). But, this in no way implies that he would risk his freedom in order to do so. In fact, during his 2015 parole hearing, Mr. Pollard specifically "acknowledged he will need specific permission to travel, but he indicated he has no intention to do so." (Lauer Decl. Ex. I). Mr. Pollard, who does not have a passport, fully understands that he would spend the rest of his life in prison if he were to attempt

to board an airplane without permission. There is no rational factual basis to conclude that he would take that risk if the GPS Monitor were removed.

D. The GPS Monitoring Condition And Curfew Cannot be Justified by the Government's Outdated Concern that Mr. Pollard Might "Possibly" Flee to Israel

The Commission's effort to portray Mr. Pollard as a "flight risk" also relies on the statement of "concern" from Jay Bratt of the National Security Section of the U.S. Attorney's Office in Washington, D.C., at Mr. Pollard's 2014 parole hearing. According to the summary of the hearing, where the Justice Department opposed parole for Mr. Pollard, Mr. Bratt expressed a "concern about the subject fleeing this county [*sic*] while on supervision possibly going to Israel without US Government approval." (Lauer Decl. Ex. H).

One year later, however, the government apparently assessed those risks differently. On July 1, 2015, Mr. Bratt provided a letter to Mr. Pollard stating that the government would not advocate at Mr. Pollard's 2015 parole hearing that there was a "reasonable probability that Mr. Pollard would violate a federal, state or local crime." [Docket No. 3 at Ex. E]. Mr. Bratt did not mention any risk that Mr. Pollard might flee the country, in violation of his parole conditions. Likewise, at Mr. Pollard's parole hearing six days later, on July 7, 2015, Gregg Maisal of Mr. Bratt's office stated that *if* Mr. Pollard were to request foreign travel from the Commission, the Commission should notify the U.S. Attorney's Office. (Lauer Decl. Ex. I). Mr. Maisal, Chief of the National Security Section of the U.S. Attorney's Office in Washington D.C., did not ask the Commission to impose a special condition barring foreign travel, or a GPS monitor. He did not repeat the concern from a year before that Mr. Pollard might possibly be a flight risk. He merely asked for notification if Mr. Pollard were to make a travel request.

Thus, the Commission's reliance on the outdated statement at the 2014 hearing is misplaced. That statement, essentially abandoned by the government in 2015 (correctly), cannot provide a rational factual basis for the GPS Monitoring Condition or curfew.

E. The Computer Monitoring Condition is Not Supported by the Erroneous Assertion that Mr. Pollard "Dissembled" at his Parole Hearing

Finally, in an attempt to furnish contemporary evidence that might support the imposition of the Computer Monitoring Condition, the Commission makes the absurd contention that Mr. Pollard has "demonstrated a recent propensity to dissemble" because he "represented to the Commission at [his] mandatory parole hearing that [he] had secured employment," but represented to the Court "that the special conditions of parole interfere with [his] ability to obtain employment." (SNOA at 4).

This illogical assertion again demonstrates the cynicism with which the Commission approached the remand. Mr. Pollard had indeed secured employment prior to his incarceration. With the aid of his counsel, he secured this employment prior to the imposition of the Computer Monitoring Condition. Once the condition was imposed, however, Mr. Pollard was forced to defer the employment, because he could not reasonably ask his prospective employer to subject its company network to monitoring by the government. The fact that the Computer Monitoring Condition interfered with Mr. Pollard's post-release plan is in no way evidence of a "propensity to dissemble." As set forth in the Lauer Declaration, Mr. Pollard's job offer remains open and concrete, and he will be able to begin employment as soon as the Computer Monitoring Condition is removed.

As further purported evidence of Mr. Pollard's alleged "propensity to dissemble," the Commission states that Mr. Pollard has "consistently represented [him]self as a 'White Knight' for Israel," when in fact "the record shows [he] passed or attempted to pass classified

information to a number of entities unconnected with Israel."[3] Thus, the Commission apparently "views monitoring [Mr. Pollard's] computer usage as an *aid* to [his] rehabilitation, as knowing [his] usage is subject to review will assist . . . in pro-social usage of computer access." (emphasis added). It is entirely unclear how these assertions are indicative of a "propensity to dissemble," or what the Commission views as "pro-social usage of computer access." These purported Orwellian justifications are baffling. The lack of connection between the stated basis and the restrictions confirms that the restrictions imposed on Mr. Pollard are divorced from any legitimate goal of the parole system.

Because Mr. Pollard has not been untruthful with the Commission in any respect, the Special Conditions cannot be founded on false assertions to the contrary.

II. THE GPS MONITORING CONDITION VIOLATES RFRA

Even if the Court concludes that the Commission has established some factual basis for some of the Special Conditions, Mr. Pollard is still entitled to relief from the GPS Monitoring Condition under RFRA. RFRA prohibits the government from substantially burdening a person's exercise of religion unless it can "demonstrate[] that application of the burden to the 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. § 2000bb-1(a)-(b).

The GPS Monitoring Condition substantially burdens the ability of Mr. Pollard, an Orthodox Jew, to adhere to basic tenets of his religion. One of the fundamental tenets of Judaism is the observance of the Sabbath, which lasts 25 hours. (Docket No. 6 at ¶¶ 6-7). Inserting an electrical plug into an outlet, or removing one from an outlet, is prohibited on the Sabbath, and on major Jewish holidays. (*Id.* at ¶¶ 9, 14). Most holidays occur in two

[3] Mr. Pollard was never charged with delivering information to any nation other than the State of Israel.

(sometimes three) day segments and thus last for 49 (or 73) hours. (*Id.*). Requiring Mr. Pollard to attach the charging wire to the monitoring device during the Sabbath or Jewish holidays would violate these fundamental tenets.

In addition, group worship is integral to Sabbath observance. (Docket No. 6 at ¶¶ 11-12). As the Commission acknowledges, the GPS device's battery drains faster if the parolee is away from home. (Docket No. 20 at ¶ 8). Thus, even assuming the charge lasts 25 hours when Mr. Pollard is at home, he is effectively a prisoner in his own home and cannot attend services without draining the battery and necessitating a faster recharge. Thus, the GPS Monitoring Condition effectively requires Mr. Pollard to choose between (a) leaving home to participate in group worship, but then violating the Sabbath by having to connect the charging wire, or (b) staying home to respect the prohibition against charging, but then foregoing group worship. This Hobson's choice substantially burdens Mr. Pollard's religious exercise.

Accordingly, the GPS Monitoring Condition violates RFRA unless the Commission can prove a compelling governmental interest in requiring GPS monitoring *and* that the GPS device is the least restrictive means of achieving that interest.

The Commission will argue, as it has before, that it has an interest in keeping Mr. Pollard in the country for supervision. But that could be true of all parolees who have families in, or emotional ties to, other countries. Indeed, the Commission could articulate the same interest in keeping parolees in the *district* for supervision, and every parolee has family, friends, or confederates in other districts. But as the Probation Department for the Southern District of New York has admitted, GPS monitoring is extremely rare. (Docket No. 9 ¶ 5). The Commission has offered no facts to suggest that Mr. Pollard is any more likely to violate the geographic parole conditions than any other parolee. The Commission's interest in keeping Mr.

Pollard in the United States cannot be a "compelling" interest sufficient to violate Mr. Pollard's religious liberties if that same interest applies in every single parole case.

Even if the Court were somehow to determine that the Commission has a compelling interest in preventing Mr. Pollard from leaving the country, it is still incumbent upon the Commission to show that the GPS monitor that Mr. Pollard is being forced to wear is the least restrictive method of achieving that objective. The Commission has had ample opportunity to propose a less restrictive means that would accommodate Mr. Pollard's religious practice and satisfy the Commission's supervisory interests. Its failure to offer any accommodation as required by RFRA compels vacatur of the GPS Monitoring Condition.

CONCLUSION

Mr. Pollard respectfully requests that the Court grant the Motion and issue a writ of habeas corpus to the Commission directing that the Special Conditions be vacated.[4]

Dated: April 8, 2016
New York, NY

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[4] This Motion to reopen the case and renew the Amended Petition [Docket No. 11-1] is made on all prior pleadings and filings to date, including the prior Declarations of Eliot Lauer [Docket Nos. 3, 8 and 32], Jacques Semmelman [Docket No. 9] and Rabbi Pesach Lerner [Docket No. 6], and the exhibits thereto.