

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	4:08-cr-596
V.	§	Judge Roger Vinson
	§	
SAMUEL KENT	§	

**MEMORANDUM IN SUPPORT OF KENT’S
§2255 MOTION TO VACATE AND CORRECT SENTENCE**

COMES NOW SAMUEL B. KENT, through counsel Dick DeGuerin and Sean Buckley, and files this Memorandum in Support of his §2255 Motion to Vacate and Correct Sentence, showing the Court as follows:

1. The Federal Bureau of Prisons has ignored the Court’s intended sentence.

In defiance of this Court’s sentencing recommendation that Sam Kent participate in the B.O.P.’s substance abuse treatment program (RDAP), the Bureau of Prisons (B.O.P.) designated Sam Kent to begin serving his sentence at FMC—Devens, which does not offer RDAP. The B.O.P. then officially denied Kent admission into RDAP at any other facility.

The B.O.P. further ignored this Court’s sentence by arbitrarily classifying Sam Kent as a sex offender even though all sexual allegations against Sam Kent were dismissed by the prosecutor, and even though Sam Kent pled guilty to Obstruction of Justice, a non-violent and non-sexual offense.

Persons convicted of Obstruction of Justice are ordinarily classified as minimum-security inmates, and even high-profile inmates are properly sent to minimum-security camps to serve their sentences. In contrast, the B.O.P. has refused to place Sam Kent in minimum-security housing, instead subjecting Sam Kent to substantial time in solitary confinement. Moreover, the B.O.P. ultimately transferred Sam Kent to the custody of the State of Florida, where he was made to serve additional time in solitary confinement and endure unusually cruel and abusive treatment.

2. Contrary to the public interest, The Federal Bureau of Prisons has subjected Sam Kent to abusive psychological and physical conditions that have jeopardized his ongoing recovery from severe depression and alcoholism, while arbitrarily prohibiting him from participation in rehabilitative programs.

A. Sam Kent's Treatment Generally

On May 11, 2009, the Court sentenced Sam Kent to 33 months imprisonment, with a recommendation that he participate in the B.O.P.'s residential substance abuse treatment program (RDAP). A participant in RDAP is eligible for a one-year sentence credit.¹

Upon Sam Kent's surrender to the Federal Medical Facility at Devens, Massachusetts on June 15, 2009 to begin serving his sentence, the B.O.P. began subjecting him to conditions tantamount to psychological and physical torture.

¹ 18 U.S.C. §3621(e)(2)(B). Kent does not argue a liberty interest in the RDAP sentence reduction. *Richardson v. Joslin*, 501 F.3d 415 (5th Cir. 2007).

For example, since his surrender Sam Kent has spent a total of nearly two months (fifty-eight days) in solitary confinement for non-disciplinary reasons.² Forty-three of these days (September 3 to October 15, 2009) formed one continuous block of time in solitary, and 15 days (January 25 to February 8, 2010) formed a second continuous block. Sam Kent never requested such confinement and to the contrary, pleaded with B.O.P. officials to allow him to remain in the prison's general population.

Empirical research and experience have shown severe damaging psychological effects of solitary confinement, particularly among individuals whose internal emotional life is already chaotic or fearful. *See* Grassian, S. (1993). "Psychiatric Effects of Solitary Confinement." Declaration submitted in September 1993 in *Madrid v. Gomez*, 889 F.Supp. 1146; *see also*, Atul Gawande, *Hellhole*, *The New Yorker*, Mar. 2009. Solitary confinement often results in severe exacerbation of a previously existing mental condition, and almost inevitably imposes significant psychological pain during the period of isolated confinement. Grassian at 2. B.O.P. officials knew of Sam Kent's history of severe depression and alcohol addiction, which was well-documented in his presentence report. Notwithstanding these realities, the B.O.P. unnecessarily subjected Sam Kent to solitary confinement. Sam Kent's experience in solitary confinement was particularly distressing because B.O.P. officials refused to tell him when, if ever, he would be released from solitary or where they were sending him, and refused to allow him contact with his wife or his attorney.

² Sam Kent has had no disciplinary infractions.

In late June, 2009, on the day Sam Kent resigned his position as a U.S. Federal Judge, B.O.P. staff locked Sam Kent—wearing only a smock and carrying only a single sheet—in a filthy, completely empty cell where the temperature was kept at 60 degrees. The only bed in the room was a raised concrete slab with no mattress, and the light was left on constantly.

In September 2009 the B.O.P. placed Sam Kent in transit status and bounced him around the eastern and central United States during a large portion of September and October, 2009, ultimately delivering Sam Kent to the custody of the Florida Department of Corrections. During much of his time in transit, officials made it impossible for Sam Kent to communicate with his wife. This caused additional and unnecessary emotional distress for both Sam Kent and his wife, and only added to the psychological despair that came with Sam Kent's involuntary isolation in solitary confinement.

When Sam Kent finally landed at the Lake Butler Reception Center for intake into the Florida Department of Corrections, the B.O.P.'s lack of oversight allowed Florida state guards to physically and mentally abuse Sam Kent. A Sergeant³ forced Sam Kent to strip naked and perform a painful and repetitive series of humiliating exercises. Once Sam Kent was too tired and in too much pain to perform the exercises any more, the Sergeant confiscated Sam Kent's wedding ring and used it to cruelly ridicule Sam Kent.

Sam Kent spent the next 16 days in solitary confinement at Lake Butler where, due to lack of B.O.P. oversight, he was forced to try to sleep the first night helplessly

³ The Sergeant's name is unknown, but he is believed to be in charge of property at Lake Butler. He has a widely-known reputation for cruelty.

listening to the continuous screams of a man being violently raped in the next cell. Sam Kent was horrified to observe that the guards ignored the man's screams and only came to remove the man from the cell after the attack had finally ended.

B. The B.O.P.'s Rulings as to Sex Offender Status and DAPS

Upon Sam Kent's initial entry into custody, B.O.P. officials falsely applied a "sex offender" Public Safety Factor (PSF) to Sam Kent's file, which has foreclosed his ability to participate in educational programs, for instance, a computer education course. This restriction is substantially impairing Sam Kent's efforts to prepare for release and reintegration into society, since he has also had to give up his law license. Prohibiting Sam Kent from participating in a computer education course under the circumstances—a blind application of an overbroad bureaucratic policy—produces an absurd result. None of Sam Kent's offense conduct, or any other conduct associated with his personal history, has anything to do with computers. The rationale underlying computer restriction for sex offenders is to limit contact with minors or access to illegal pornography. However, nothing in Sam Kent's social history suggests that he has ever had—or sought—inappropriate contact with minors or access to illegal pornography. The B.O.P.'s arbitrary and capricious restriction clearly disserves the public interest in Sam Kent's case and probably countless others.

Notwithstanding the Court's recommendation that Sam Kent participate in the B.O.P.'s substance abuse treatment program (RDAP) and receive the associated 12-month sentence credit, the B.O.P. arbitrarily denied Sam Kent admission to RDAP. The B.O.P. claims its denial was based on B.O.P. "Program Statement" 5330.11, an

administrative rule that was apparently unknown to the Court or the parties at the time of sentencing. Program Statement 5330.11 provides that for entry into RDAP, an inmate must have a verified pattern of substance “abuse” or “dependence” within the 12-month period prior to his arrest. The B.O.P. defines the terms “abuse” and “dependence” in this context to require some actual use of a substance. Because Sam Kent truthfully admitted that he had not used drugs or alcohol during the 12 months preceding his arrest, Program Statement 5330.11 renders him ineligible for RDAP.

While the B.O.P.’s narrow definitions of “abuse” and “dependence” may have some value in diagnostic or academic settings, the definitions are arbitrary when used to set the threshold standard for RDAP eligibility. It is common knowledge among professionals trained to treat persons with addiction that an addict’s abstention from using a substance does not end the addiction. It is sadly ironic that a person such as Sam Kent who has demonstrated serious effort in trying to control his addiction would be deemed ineligible for the same level of assistance as a person who has demonstrated no such effort. Adding to the arbitrariness of the B.O.P.’s standard is the B.O.P.’s strange reliance on the date of arrest as the end point of the 12-month period during which one must have used a substance to be eligible for RDAP. The date of a person’s arrest has no fixed relationship to the offense conduct, the relevant conduct, or even one’s surrender into B.O.P.; any of these other events would be more meaningful to the assessment of whether one would stand to benefit from RDAP.

In Sam Kent’s case, the B.O.P. was fully aware from the presentence report that Sam Kent’s offense conduct and relevant conduct were directly intertwined with his

alcoholism, and that Sam Kent continued to struggle with his difficulties even after his arrest, although he did not actually drink. Once again, the B.O.P. has enforced an arbitrary bureaucratic rule that has produced an absurd result when applied to Sam Kent.

Sam Kent has been voluntarily attending the Florida Department of Corrections' substance abuse treatment program, and expects to complete the program in October, 2010. However, unlike RDAP, completion of the Florida program does not allow Sam Kent an opportunity to earn a 12-month sentence reduction. At this time, even if Sam Kent were immediately transferred back into a B.O.P. facility offering RDAP and admitted to RDAP, Sam Kent's remaining sentence would not afford sufficient time for completion of RDAP and realization of a sentence reduction. Sam Kent is therefore not asking to return to B.O.P. custody.

3. Sam Kent's sentence violates due process.

A protectable liberty or property interest gives rise to the requirement of due process. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). In this case, Sam Kent has a liberty interest in the length of his sentence.

At Sam Kent's sentencing, the Court implemented a carefully-considered sentence under 18 U.S.C. §3553, with an emphasis on reflecting the seriousness of the offense, promoting respect for the law, providing just punishment for the offense, affording adequate deterrent to criminal conduct, protecting the public from further crimes, and providing medical care or other treatment that might be appropriate for Sam Kent individually. Ct. R. pp. 71-72. Inherent in the Court's sentence was a belief that Sam

Kent was eligible for RDAP and the corresponding 12-month sentence credit, and that the B.O.P. would treat Sam Kent humanely.

Sam Kent acknowledges that a sentencing court has no enforceable expectations regarding the B.O.P.'s discretion. *See United States v. Addonizio*, 442 U.S. 178, 190 (1979)(sentencing judge's reliance on a misunderstanding or inaccurate prediction concerning an agency's discretion in executing a sentence will not invalidate the sentence); *United States v. Delario*, 120 F.3d 580, 582 (5th Cir. 1997).

However, in contrast to a claim that a sentencing court made an inaccurate prediction concerning an agency's discretion, this §2255 motion alleges "objectively ascertainable errors" at the time of sentencing, which were (1) the mistaken belief that the B.O.P. had discretion to admit Sam Kent into the RDAP program and award Sam Kent with a 12-month sentence credit for RDAP participation, when the B.O.P. had no such discretion due to its own arbitrary rules; (2) the mistaken belief that the B.O.P. would not classify Kent as a sex offender, when the B.O.P. was required under its own arbitrary rules to falsely classify Sam Kent as a sex offender; (3) the mistaken belief that the B.O.P. would not force Kent to serve a portion of his sentence in solitary confinement; (4) the mistaken belief that Sam Kent's level of security in B.O.P. would not prevent him from being placed in a minimum security camp; and (5) the mistaken belief that the B.O.P. would not simply wash their hands of Sam Kent and ship him off to the Florida

Department of Corrections without maintaining direct B.O.P. oversight. These objectively ascertainable errors caused Kent to be sentenced differently.⁴

Several courts around the United States have explained the difference between an “inaccurate prediction concerning an agency’s discretion” and an “objectively ascertainable error” occurring at sentencing.

The Third Circuit addressed the issue in *United States v. Eakman*, 378 F.3d 294 (3rd Cir. 2004), holding that the mistake in believing the B.O.P. had legal authority to place the defendant in a community confinement center was “objectively ascertainable error” when the district court would have imposed a different sentence absent the error. 378 F.3d at 301-02.

The Second Circuit addressed the issue in *King v. Hoke*, 825 F.2d 720 (2nd Cir. 1987). The *King* court explained that in *Addonizio*, the sentencing judge had made an incorrect prediction of how the Parole Commission would exercise its discretion, and in contrast, in *King*’s case there was an “objectively ascertainable error” about *King*’s minimum statutory parole eligibility date, a matter of law rather than a prediction concerning an agency’s discretion. 825 F.2d at 724-25. The Fifth Circuit has endorsed the *King* holding as an “instructive” example of due process violations at sentencing. *Burge v. Butler*, 867 F.2d 247, 250 (5th Cir. 1989).

⁴ The Court was led to forego any further reductions (including but not limited to downward departures), in order to sentence Sam Kent to a term of months sufficient to absorb a potential 12-month reduction for RDAP participation while still providing a custodial term sufficient to satisfy §3553.

United States v. Hollenbeck, 932 F.Supp. 53 (N.D.N.Y. 1996) also supports Sam Kent's claim. The *Hollenbeck* court found that the defendant was entitled to a further reduction in his sentence where an initial reduction had been based on the district court's belief that sentencing at the top end was necessary to allow the defendant to participate in the B.O.P.'s drug program, and the defendant was later told that even that sentence was not long enough to allow such participation. *Hollenbeck* at 57-58. The Court found that the mistake deprived Hollenbeck of due process of law. *Id.* at 58.

In Sam Kent's case, although the B.O.P. may appear to have legal authority to place Sam Kent in RDAP, or to not classify Sam Kent as a sex offender, it is evident that the B.O.P. does not have administrative discretion in these matters as a result of its administrative rules ("Program Statements") that it is legally required to follow even though they are arbitrary. Any apparent variance between legal and administrative authority in this context is therefore a distinction without a difference.

Sentencing defects like this offend the Due Process Clause of the Fifth Amendment. *See United States v. Stevens*, 851 F.2d 140, 143 (6th Cir. 1988)("Convicted defendants, including those who plead guilty, have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information."); *Parks v. United States*, 832 F.2d 1244, 1246 (11th Cir. 1987)("Due process protects a defendant's right not to be sentenced on the basis of . . . invalid premises.").

4. Relief requested.

Sam Kent respectfully requests that the Court vacate and correct his sentence giving consideration to the fact that Sam Kent is not eligible for the B.O.P. RDAP and any corresponding sentence credit, the fact that the B.O.P. has imposed unreasonable restrictions upon Sam Kent due to his arbitrary "sex offender" classification, the fact that the B.O.P. has forced Kent to spend a substantial amount of time in solitary confinement, and the fact of Sam Kent's treatment by the B.O.P. and the Florida Department of Corrections.

Respectfully submitted,

DeGUERIN & DICKSON

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Memorandum in Support of Kent's §2255 Motion to Vacate and Correct Sentence** has been filed via the ECF System and served on the following:

Peter J. Ainsworth, Senior Deputy Chief
AnnaLou T. Tirol
John Pearson
United States Department of Justice
Public Integrity Section
Criminal Division

/s/ Dick DeGuerin
Dick DeGuerin

Dated: August 2, 2010