

COMMONWEALTH OF MASSACHUSETTS

SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT
No. SJC-_____

SALEM DISTRICT COURT
1936CR1242

SALEM SUPERIOR COURT
1977BP0276

ESSEX, SS.

LUIS ANTONIO REYES SANTANA
a/k/a JOSE SOTO,
Petitioner

v.

A JUSTICE OF THE SALEM DISTRICT COURT,
Respondent

EMERGENCY PETITION PURSUANT TO CHAPTER 211, SECTION 3
SEEKING LEAVE TO APPEAL FROM ORDER DENYING THE
PETITIONER'S MOTION TO STRIKE OR IN THE ALTERNATIVE,
MODIFY CONDITIONS OF RELEASE

FOR THE PETITIONER:

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPREME JUDICIAL COURT
NO. _____
SALEM DISTRICT COURT
DOCKET NO. 1936CR1242
SALEM SUPERIOR COURT
DOCKET NO. 1977BP00276

LUIS ANTONIO REYES SANTANA
a/k/a JOSE SOTO,
Petitioner

v.

A JUSTICE OF THE SALEM DISTRICT COURT,
Respondent

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY PETITION
PURSUANT TO CHAPTER 211, SECTION 3 SEEKING LEAVE TO
APPEAL FROM ORDER DENYING THE PETITIONER'S MOTION TO
STRIKE OR IN THE ALTERNATIVE, MODIFY CONDITIONS OF
RELEASE**

I. INTRODUCTION

In a case where the Commonwealth charges the Petitioner with furnishing a false name (Jose Soto) to police, the Salem District Court has ordered that the Petitioner surrender his passport bearing his true name (Luis Antonio Soto Reyes) to the Court as a condition precedent to posting bail.

In so doing, the Court compels the Petitioner to confess to the charged offenses as a condition of pretrial liberty.

II. FACTS AND PROCEDURAL HISTORY

The Commonwealth charges the Petitioner with possessing a false RMV document (G.L. c. 90, § 24B), identity fraud (G.L. 266, § 37E) and furnishing a false identification to a police officer (G.L. c. 268, § 34A) after the Petitioner on May 12, 2019 presented a driver's license which the Petitioner obtained with the information of Jose Soto, of the Commonwealth of Puerto Rico, in order to conceal the fact that he is truly Luis Antonio Reyes Santana, an undocumented immigrant from the Dominican Republic.

At the Petitioner's first appearance, the Honorable Justice Randy S. Chapman detained the Petitioner for a period of 48 hours to allow the Commonwealth additional time to "ascertain the defendant's true identity and determine if he has outstanding warrants in any jurisdiction." Docket 1936CR1242 [RA 1]; Reasons for Ordering Bail (May 13, 2019) [RA 6]; Order Regarding Defendant's Motion to Strike, or in the Alternative, Modify Conditions of Release ("Order"), p. 1 [RA 22].

At the continued arraignment, the Commonwealth reported that the Petitioner was truly Luis Antonio Reyes Santana, a national of the Dominican Republic. Order p. 2. He also "reportedly has a passport from the Dominican

Republic." Id.; see also Affidavit of Attorney Christopher Basso [RA 28].

A fingerprint check revealed that the Petitioner had no warrants and no arrest history. Id.

Following a bail hearing, the same district court Judge ordered the Petitioner detained on \$15,000 bail.¹ Over the Petitioner's objection, the Court ordered as a condition precedent to posting bail that the Petitioner surrender his passport to the Court.² Reasons for Ordering Bail (May 15, 2019) [RA 7]; Order, p. 2. [RA 22]

On May 24, 2019 the Petitioner appeared before the Salem District Court in order to post bail. Affidavit of Attorney Murat Erkan [RA 31]. However, he remains in jail because he has not complied with the Court's Order that he surrender his passport to the Court. Id.

¹ The Superior Court, Thomas Dreschler, J., subsequently reduced the Petitioner's bail to \$9,000. Docket 1977BP0276 [RA 8]; Findings and Order Regarding Bail [RA 10]. At that hearing, the Petitioner requested that the Superior Court strike the condition that he surrender his passport. Affidavit of Attorney Murat Erkan [RA 31]. Based on its understanding that it had no authority to review conditions set by the District Court, the Superior Court declined to consider the issue. Id. The plain language of G.L. c. 276, § 58 appears to limit the Superior Court's bail review dispositional options to: release without surety; release on bail; or remand to the District Court.

² The Petitioner consented to a condition that he wear a GPS device. G.L. 276, § 87.

The Petitioner presented a motion to strike or modify the passport condition, which the Court denied on May 29, 2019. Order [RA 22].

III. ARGUMENT

First, the Court's order requiring the Petitioner to surrender his passport to the Court as a condition of bail (the "passport condition") offends the Petitioner's privilege against self-incrimination under the 5th Amendment to the United States Constitution and Art. 12 of the Massachusetts Declaration of Rights, and denies him due process of law.

Second, the Court needed, but lacked consent to impose the passport condition.

1. COMPELLED SELF-INCRIMINATION AND DUE PROCESS

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." Brangan v. Commonwealth, 477 Mass. 691, 705 (2017). Massachusetts and Federal law "establish a fundamental right to liberty and freedom from physical restraint that cannot be curtailed without due process of law." Id. at 702. "Pretrial detention encroaches on that fundamental right," and thus must be imposed only according to "strict standards." Id. at 702-703.

In the instant case, the District Court has conditioned the Petitioner's right to pretrial liberty on his production of his passport. Because the Petitioner is charged with proffering a false identification, his production of his passport, which bears his true name, serves as a confession to the crime charged. Thus, the District Court compels the Petitioner to confess to the charged offense by conditioning his eligibility for pretrial liberty on production of his passport.

The Petitioner has raised sufficient funds to post bail. He is prepared to submit to electronic monitoring. The only obstacle to his pretrial liberty is the District Court's condition that he surrender his passport and, by doing so, furnish the Commonwealth with conclusive evidence of his guilt.

In its Order, the District Court compared the passport condition to an order that a person submit to fingerprinting or participate in a lineup. Order, p. 4, citing Commonwealth v. Brennan, 386 Mass. 772 (1982). The court's analogy is inapposite. In all of the scenarios cited by the court, the evidence is the person's innate characteristics, not the contents of his mind.

For purposes of the Fifth Amendment, the act of production "may have a compelled testimonial aspect, because production may constitute an admission 'that the [evidence] existed, were in [the witness's] possession or control, and were authentic.'" In the Matter Of A Grand Jury Investigation, 470 Mass. 399, 403 (2015) quoting United States v. Hubbell, 530 U.S. 27, 36 (2000).

In Grand Jury Investigation, the SJC made it clear that "the implicit self-incrimination involved in compelled production stands on even firmer ground under art. 12[, which] specifically prohibits compelling a defendant to furnish evidence against himself." Id. (internal quotation marks omitted). There, the Commonwealth correctly conceded that it could not compel the target of a grand jury investigation to produce his telephone, because of the implicit assertions which necessarily accompany that production. Id. at 404. The same implicit assertions regarding knowledge of the object's existence, location and authenticity come with the Petitioner's production of his passport here. Even more problematic, however, is the import of those assertions given the charged offense. Unlike the telephone in Grand Jury Investigation, which ostensibly might or might not have contained evidence, the

Petitioner's production of his passport would be an unequivocal confession to the charged offense. That is, by producing his passport, the Petitioner confesses that he is Luis Antonio Reyes Santana, not Jose Soto -- just as the Commonwealth alleges.³

³ In its Order, the court also attempted to dismiss the self-incriminatory implications of the passport condition by presuming that, because the Petitioner is in custody, the passport would likely be physically produced by "some third party." Order, p. 5. This reasoning fails for several reasons. First, the court has no information as to the passport's current existence or whereabouts. Assuming, however, that a "third party" possesses the passport, the district court is without authority to order third parties to act, or refrain from acting, as a condition of a defendant's release. G.L. c. 276, § 58 ("if the ... district court ... determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct ...") (emphasis added). If a "third party" possessed it, an order that the Petitioner produce his passport would be an impossible, and thus necessarily unreasonable condition which, among other evils, would thwart the presumption of personal recognizance which controls § 58 and violate the Petitioner's pretrial liberty interest. Brangan, 477 Mass. at 702. Second, in the context of this case, which concerns production of a personal document, the involvement of a third party does not attenuate the self-incriminatory aspects of production. For a third party to produce the passport, the Petitioner must have disclosed its existence and location to that person, then directed them to produce it. The third party would be acting as an agent, and his act of production would be attributable to the Petitioner. Mass. G. Evid. 801(d)(2)(C), (D) (2019 ed.). Third, in the much more likely scenario that the "third party" producer would be the Petitioner's attorney, the SJC has already specifically ruled that such compelled production is unconstitutional. Grand Jury Investigation, supra, at 404.

Alternatively, the District Court reasoned that the act of production privilege did not apply to the passport condition, because "the Commonwealth is already aware that the defendant holds a passport from the Dominican Republic." Order, p. 5, citing Commonwealth v. Gelfgatt, 468 Mass. 512, 520 (2014); Commonwealth v. Jones, 481 Mass. 540 (2019). Putting aside the implications of the District Court's view that the Petitioner's guilt of the charged offense is a "foregone conclusion," the District Court's invocation of the doctrine is deeply flawed.

For the "foregone conclusion" exception to apply, "the government must establish its knowledge of (1) the existence of the evidence demanded; (2) the possession or control of that evidence by the defendant; and (3) the authenticity of the evidence." Gelfgatt, 468 Mass. at 522. In the article 12 context, the Government bears the burden of proving these elements beyond a reasonable doubt. Jones, 481 Mass. at 555.

In the instant case, the Court possesses no evidence on any of these elements, let alone proof beyond a reasonable doubt of each of their existence. Instead, the Court possesses the Commonwealth's bald representations that it believes that an individual named Luis Antonio Reyes Santana, who resembles the Petitioner,

was at some unspecified time issued a passport from the Dominican Republic. This is all the District Court knows. The court knows nothing about the source of the Commonwealth's "belief," or the reliability of its information.

But even if each of the above contentions were proved beyond a reasonable doubt, none of the elements of the foregone conclusion analysis are met. Despite the historical issuance of a passport, the Commonwealth possesses no evidence that the passport currently exists. If it exists, the Commonwealth possesses no evidence that the Petitioner still possesses and controls it⁴. If he possesses and controls it, the Commonwealth has no information as to the authenticity of that which the Petitioner purportedly possesses. Just like the defendant in Commonwealth v. Hughes, 380 Mass. 583, 592, cert. denied, 449 U.S. 900 (1980), from whom the Commonwealth sought production of a gun used in a shooting, the defendant "would be making implicitly a statement about its existence, location and control ... [facts] about which the Commonwealth desires but does not

⁴ As stated supra, the Court speculated that the passport would be produced by a "third party," with no basis in fact for that inference.

have solid information ... [T]he Commonwealth is seeking to be relieved of its ignorance or uncertainty by trying to get itself informed of knowledge the defendant possesses."

The Court's condition directly and unquestionably compels the Petitioner to furnish evidence against himself as a condition of posting bail.

"A State may not impose substantial penalties because a [person] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." Minnesota v. Murphy, 465 U.S. 420 (1984), citing Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977).

The demand that the Petitioner sacrifice his right to pretrial liberty in order to preserve his right to remain silent constitutes just such a "substantial penalty" on the exercise of his right and is thus unlawful. Cf. Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (individual threatened with discharge from employment for exercising the privilege had not effectively waived it by responding to questions rather than standing on his right to remain silent).

The right to due process of law is a right "of constitutional stature whose exercise a State may not condition by the exaction of a price." Id.

Undersigned counsel has found no precedent for the Court's decision to condition the Petitioner's pretrial liberty on his confession to the charged offense.

Quegan v. Parole Board, 423 Mass. 834 (1996) provides some comparison to this case. There, the parole board considered the defendant's failure to admit guilt as a factor adverse to a grant of parole. Id. at 836. The Court rejected the defendant's constitutional challenges, noting that "there is no constitutionally protected liberty interest" in a grant of parole. The Court then held that the defendant's failure to admit guilt was not an arbitrary consideration in the parole context and, since it was only one factor, not an abridgment of his right to due process. Id. at 837. The Court was careful to caution that a different result might obtain if parole was denied based only on an inmate's assertion of innocence. Id.

This case stands on far different footing. In contrast to a post-conviction parole proceeding, in which the defendant has been convicted only after having been afforded all of his due process rights, at issue here is a "fundamental right to liberty and freedom from physical restraint," which may not be curtailed until he has been afforded the due process of law. Brangan, *supra*, at 702.

Moreover, the Petitioner's refusal to incriminate himself by surrendering his passport is not but a factor in his pretrial detention, it is the sole factor in his pretrial detention.

The District Court's Order extracts the Petitioner's confession as a condition precedent to his very first procedural right - the right to freedom from penalty until convicted. It renders each other of his constitutional rights a hollow formality. Accord, Brangan, supra, at 692 ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning"). Consequently, the passport condition unlawfully deprives the Petitioner of his right to due process and violates his privilege against compelled self-incrimination.

The problematic nature of the District Court's passport condition is further underscored by its needlessness. Below, the Petitioner offered that, to whatever extent the District Court determined that it should hold onto the Petitioner's passport as a deterrent to flight, the court can accomplish precisely the same objective by permitting the Petitioner to surrender his passport under seal, and forbid its use in any

proceeding. "Although due regard for the Fifth Amendment forbids the State to compel incriminating answers ... that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use." Lefkowitz v. Turley, 414 U.S. 70, 84 (1973). Although federal law only requires use immunity for such a compelled disclosure, under Massachusetts law, Art. 12 "requires transactional immunity to supplant the privilege against self-incrimination." Commonwealth v. Hunt, 462 Mass. 807, 813 (Mass. 2012).

The District Court rejected the Petitioner's proposal, reasoning that it was premature until such time as the Commonwealth offered the passport into evidence. Order, at 5-6. The Court reasoned that the Petitioner should surrender his passport with no limits on its use, then hope for a favorable ruling at a future motion to suppress. Again, the District Court's reasoning is fundamentally flawed, because it attacks this Commonwealth's historical rejection of all compelled self-incrimination. Stated simply, the law does not permit the Government to compel confessions, subject to nice arguments regarding its later admissibility. Instead, the Fifth Amendment to the United States

Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself," and Art. 12 of the Massachusetts Declaration of Rights provides that no person shall "be compelled to accuse, or furnish evidence against himself." These rights are absolute, and the decision whether to confess must always begin with the free will of the accused. To permit his confession to be forced and, essentially, taken "de bene," is an intolerable encroachment on privileges which form the heart of a free society.

2. THE COURT LACKED A STATUTORY BASIS FOR ITS CONDITION

G.L. c. 276, § 58 does not authorize the Court to order as a condition of release that the Petitioner surrender his passport.

The first paragraph of § 58 provides that "if the justice ... of the district court ... determines it to be necessary, the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release." G.L. c. 276, § 58, ¶ 1.

A plain reading of § 58 reveals that this statute authorizes the Court to set a limited universe of conditions - restraints on personal associations or conduct. The Court can therefore order a defendant, for example, to stay away from a potential witness or location. However, § 58 does not grant unlimited authority to order conditions.

In contrast, G.L. c. 276, § 87 allows the court to order a broad spectrum of pretrial conditions with a defendant's consent. Section 87 provides that "any district court ... may place on probation ... any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty[.]" G.L. c. 276, § 87 (emphasis added).

Comparison of the first and second paragraphs of § 58 further illustrates the limited nature of the Court's authority to impose conditions under the first paragraph of § 58. The second paragraph of § 58 authorizes the Court, in domestic violence cases, to "impose conditions on a person's release in order to ensure the appearance of the person before the court and the safety of the alleged victim, any other individual or the community[.]" G.L. c. 276, § 58, ¶ 2.

If the Court construes the language in § 58, ¶ 1 authorizing "restrictions on personal associations or conduct" to permit imposition of an unlimited universe of conditions, the language authorizing a broader scope of conditions in § 58, ¶ 2 and in § 87 would be rendered superfluous, contravening a basic tenet of statutory construction. See Commonwealth v. Soto, 47 Mass. App. Ct. 914, 916 (1999) ("a basic tenet of statutory construction [is] that a statute must be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.") (internal citation and punctuation omitted).

The condition imposed in the instant case - that the Petitioner surrender his passport - falls outside of the narrow scope of conditions authorized by § 58. This condition cannot fairly be characterized as a "limitation[] on personal associations or conduct." Instead, it is a condition that compels conduct, something that § 58 does not contemplate.

It is also important to note that the sentence of § 58, ¶ 1 which permits "specific restrictions on personal associations or conduct" ends with a clause illustrating those "restrictions" as "including, but not limited to, avoiding all contact with an alleged victim of the crime

and any potential witness or witnesses who may testify concerning the offense ..." While catch-all "including, but not limited to" language invites a generally fulsome reading, the language of the illustrative clause is not mere surplusage. Instead, it should be read to constrain those conditions "restricting personal associations or conduct" to the same general class of conduct set forth in its example clause. Considered in that light, surrendering one's passport is far removed from the same class or kind of the restrictions (relating to contact with people) which ¶ 1 contemplates.

The legislature amended the bail statute in 2006, in response to the Court's ruling in Commonwealth v. Dodge, 428 Mass. 860, 865-866 (1999) that § 58 did not authorize the court to impose conditions of release. The legislature's amendments were targeted and purposeful, and this Court must presume the statutory limitations were deliberate. If the legislature intended to authorize unlimited release conditions or, as the District Court concluded, any condition plausibly connected to the bail statute's purpose of deterring flight, it would have done so. It did not. Instead, the legislature made narrow amendments to § 58 to permit the District Court to impose limited restrictions, aimed at

limiting associations and actions, which restrictions have nothing to do with the question of flight.

The plain language of the statute, particularly when viewed in the context of the statutory scheme as a whole, and in light of the operation of its limiting clause, suggests that the Court lacked authority to impose the instant condition under § 58.

Such a condition could only be imposed pursuant to § 87. But because the Petitioner objected, the Court lacked authority to impose the condition pursuant to § 87.

IV. CONCLUSION

For the reasons stated above, the Petitioner requests that this Honorable Court allow this petition and direct the District Court to vacate its Order compelling the Petitioner to submit his passport to the Court as a condition of bail.

Respectfully submitted,
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