# APPENDIX A

SECOND CIRCUIT OPINION

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SUPREME COURT, U.S.

S.D.N.Y. – N.Y.C.
17-cr-548
Furman, J.

# United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of December, two thousand twenty-two.

Present:

Barrington D. Parker,
Michael H. Park,
*Circuit Judges.**

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United States of America,

*Appellee*,

v.

Joshua Adam Schulte,

*Defendant-Appellant.*

21-2528 (L), 21-2529 (Con),
21-2530 (Con), 21-2877 (Con),
21-2878 (Con), 21-2879 (Con)

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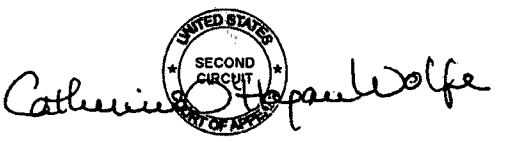
The Government moves to dismiss the appeal docketed under 21-2877 as frivolous or for summary affirmance.† Appellant, *pro se*, moves for appointment of counsel. Upon due consideration, it is hereby ORDERED that the Government's motion is GRANTED in part insofar as it seeks summary affirmance. *See Illarramendi v. United States*, 906 F.3d 268, 271 (2d Cir. 2018). It is further ORDERED that the motion for appointment of counsel is DENIED as moot because all these appeals have now been decided.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

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* Chief Judge Livingston has recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

† The other appeals with which 21-2877 is consolidated were dismissed in May 2022. 2d Cir. 21-2528 (L), doc. 189 (Or.).

# APPENDIX B

OPINION OF SOUTHERN DISTRICT NY COURT: DKT 526, 527

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | : | |
| -v- | : | 17 Cr. 548 (PAC) |
| JOSHUA ADAM SCHULTE, | : | |
| Defendant. | : | **ORDER** |

On August 14, 2019, the Court, except in two limited respects, denied Defendant Joshua Schulte's ("Schulte") motion to vacate his Special Administrative Measures ("SAMs") imposed and enforced by the Attorney General and Bureau of Prisons. *See* ECF No. 119 (hereafter the "2019 SAMs Order"). On June 24, 2021, Schulte filed a second motion to vacate the SAMs.[1] *See* ECF No. 474. Although cloaked in somewhat different constitutional guise, Schulte's arguments largely retread grounds that the Court already considered and, with two exceptions inapplicable to the instant motion, rejected in the 2019 SAMs Order.

Thus, for the reasons set forth below, the Court again **DENIES** the motion.

## DISCUSSION

*First,* to the extent Schulte seeks reconsideration of the 2019 SAMs Order, he has failed to identify "controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX*

[1] For the sake of administrative ease, the Court here documents the primary relevant docket entries. Schulte filed his first motion to vacate the SAMs at ECF No. 92, prompting the Government's opposition at ECF No. 96. The Court issued an Order at ECF No. 127 primarily denying Schulte's motion, except with respect to (1) restrictions on non-attorney members of Schulte's defense team and (2) communications between Schulte and non-immediate family members. The instant motion was filed at ECF No. 474. The Government responded in its omnibus opposition memorandum at ECF No. 499 (pp. 26–34) and Schulte filed his reply at ECF No. 520.

*Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). His claim for Eighth Amendment protection, which was not raised in his prior motion, fails because "the Eighth Amendment standard applies to sentenced prisoners," not pretrial administrative measures. *Gabbay v. Gales*, No. 97-cv7605 (NRB), 2000 WL 28156, at *1 (S.D.N.Y. Jan. 14, 2000). Schulte's Fifth Amendment due process claim, raised only in passing in his prior motion, also fails because Schulte has been afforded adequate process, including written notice under 28 C.F.R § 501.2(b), administrative recourse under 28 C.F.R §§ 542.13–15, and judicial avenues such as the instant motion. *See Wilkinson v. Austin*, 545 U.S. 209, 216, 229 (2005) (upholding "written notice" and "informal, nonadversary procedures" as sufficient process for detainees assigned to solitary confinement).

*Second*, to the extent Schulte moves to vacate the SAMs based on changed circumstances subsequent to the 2019 SAMs Order, he has failed to undermine the original factual underpinnings for the SAMs. To the contrary, since the SAMs were imposed, Schulte, *inter alia*, has been convicted of violating this Court's protective orders, and has intentionally disclosed information he knows to be classified—including in a recent publicly-filed motion seeking declassification of that very information.[2] Thus, the Court today holds, as it did in 2019, that the SAMs are justified by a demonstrable "danger that [Schulte] will disclose classified information." *See* 2019 SAMs Order 7.

Nonetheless, the Court recognizes one change in circumstances between August 2019 and today: time. *See Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) (acknowledging "the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement"). Pursuant to the SAMs, Schulte has been held in solitary confinement for a long period, and—even relative to other

[2] The Clerk of Court removed this filing from the public docket on September 21, 2021.

solitary detainees—subject to difficult conditions.[3] Still, the Court repeats its 2019 holding that these measures, although hard, are "'reasonably related' to legitimate penological objectives" so long as Schulte is facing trial for substantial espionage charges, handling and reviewing sensitive classified material in discovery as he prepares his *pro se* defense, and continuing his troubling pattern of disrespect for the Court's protective orders and other directives regarding classified information. *United States v. El-Hage*, 213 F.3d 74, 81 (2d Cir. 2000) (quoting *Turner v. Safley*, 482 U.S. 78, 87 (1987)). Moreover, Schulte has already signaled his intent to appeal his convictions (*see* Def. Sentencing Reply 2, ECF No. 509), which will likely prolong his contact with classified materials. In these circumstances, the SAMs serve a very specific purpose under 28 C.F.R § 501.2. They are not a "punitive" end, but rather a reasonable "administrative" means. *United States v. El-Hage*, 213 F.3d 74, 79 (2d Cir. 2000); *see also Pell v. Procunier*, 417 U.S. 817, 827 (1974) (holding that while courts "cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties," they "should ordinarily defer to [officials'] expert judgment" in administrative matters); *Jones v. N. Carolina Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 128 (1977) ("The necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations.").

[3] *See* Katherine Erickson, *This Is Still A Profession: Special Administrative Measures, the Sixth Amendment, and the Practice of Law*, 50 COLUM. HUM. RTS. L. REV. 283, 320 (2018) ("SAMs create isolation that is even more extreme than solitary confinement."); Yale Law School, Allard K. Lowenstein Human Rights Clinic, *The Darkest Corner: Special Administrative Measures and Extreme Isolation in the Federal Bureau of Prisons*, at 6–8 (Sept. 2017), *available at* https://law.yale.edu/sites/default/files/area/center/schell/document/sams_report.final.pdf. ("SAMs inflict the most severe form of isolation found in United States federal prisons."); *see also Hum. Rts. Watch v. Dep't of Just. Fed. Bureau of Prisons*, No. 13-cv-7360 JPO, 2015 WL 5459713, at *9 (S.D.N.Y. Sept. 16, 2015), *on reconsideration sub nom. Watch v. Dep't of Just. Fed. Bureau of Prisons*, No. 13-cv-7360 (JPO), 2016 WL 3541549 (S.D.N.Y. June 23, 2016) ("As of October 21, 2013, there were only eight persons subject to SAMs under § 501.2 [National Security Cases] and 46 persons subject to SAMs under § 501.3 [Prevention of Acts of Violence and Terrorism] . . . .").

## CONCLUSION

For the reasons stated, the Court again denies Schulte's motion to vacate the SAMs. The Clerk of Court is directed to terminate the motion at ECF No. 474.

Dated: New York, New York
October 6, 2021

SO ORDERED

Paul A Crotty

HONORABLE PAUL A. CROTTY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | : | |
| -v- | : | 17 Cr. 548 (PAC) |
| JOSHUA ADAM SCHULTE, | : | |
| Defendant. | : | **MEMORANDUM & ORDER** |

On February 9, 2021, the Court denied without prejudice Defendant Joshua Schulte's ("Schulte") "petition for writ of habeas corpus" filed in the form of a motion (*see* ECF No. 447) on the docket in the above-captioned criminal proceedings. *See* ECF No. 453. Schulte now moves the Court to reconsider that denial. *See* Def. Reconsideration Mot., ECF No. 456.[1] For the reasons set forth below, the motion for reconsideration is **DENIED**.

Further, on September 30, 2021, Schulte filed another habeas petition in the form of a motion seeking both habeas relief and bail. *See* Def. Habeas and Bail Mot. (currently undergoing classification review prior to docketing). For the same reasons articulated here and in the Court's denial of Schulte's previous habeas motion, Schulte's latest motion for habeas relief is also **DENIED** without prejudice.[2]

## DISCUSSION

The Court notes, as a preliminary matter, that Schulte's motion for reconsideration is technically time-barred. In the Southern District, such motions in criminal matters are subject to

[1] For the sake of administrative ease, the Court here documents the primary relevant docket entries. Schulte filed his original motion at ECF No. 447. The Government opposed the motion in a letter at ECF No. 450, and the Court endorsed the Government's letter, denying Schulte's original motion at ECF No. 453. Schulte then filed the instant motion to reconsider at ECF No. 456, prompting the Government's opposition at ECF No. 500 and Schulte's subsequent reply at ECF No. 506.

[2] The Court does not here address Schulte's motion for bail included alongside the recent habeas motion.

Local Criminal Rule 49.1(d): "A motion for reconsideration . . . shall be filed and served within fourteen (14) days after the Court's determination of the original motion."[3] The instant motion was filed on March 4, 2021,[4] more than three weeks after the Court's initial February 9, 2021 denial. Generally, such an untimely filing may be excused only for good cause. *See United States v. Lisi*, No. 15-cr-457 (KPF), 2020 WL 1331955, at *1 (S.D.N.Y. Mar. 23, 2020). "Critically, a moving party's *pro se* status will not, on its own, excuse a delay." *United States v. Okparaeke*, No. 17-cr-225 (NSR), 2019 WL 4233427, at *2 (S.D.N.Y. Sept. 6, 2019) (collecting cases). Here, however, in light of Schulte's *pro se* status,[5] the restrictive Special Administrative Measures ("SAMs") imposed upon him, and the ongoing mail delays that the Court has already addressed in a previous Order (*see* ECF No. 515; *see also* Def. Reconsideration Mot. 1), the Court deems appropriate an approach that is "more liberal in its discretion regarding procedural errors." *Davidson v. Scully*, 172 F. Supp. 2d 458, 462-63 (S.D.N.Y. 2001) (excusing *pro se* plaintiff's untimely filing because, in addition to his *pro se* status, he had timely filed a notice of motion with the clerk). It thus excuses the untimely filing.

Nonetheless, the Court finds Schulte's motion to be without merit. "A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality

[3] Because Rule 49.1(d) is of "comparatively recent vintage," when ruling on motions for reconsideration, courts in this District rely on cases decided under both Local Criminal Rule 49.1 as well as Local Civil Rule 6.3. *United States v. Bright*, No. 18-cr-56-1 (KPF), 2021 WL 4084391, at *1 (S.D.N.Y. Sept. 8, 2021); *see also United States v. Carollo*, No. 10-cr-654 (HB), 2011 WL 5023241, at *2 (S.D.N.Y. Oct. 20, 2011) ("Although neither the Federal Rules of Criminal Procedure nor the Local Criminal Rules of this Court address the proper standard for a motion for reconsideration in criminal cases, courts in this district have applied the standard of Local Rule 6.3.").

[4] The Court notes that the letter itself is dated February 24, 2021.

[5] Although the Court had not yet granted Schulte permission to proceed *pro se* at the time he filed his original habeas motion in January 2021, nor when he filed the instant motion to reconsider in March 2021, it would ultimately do so after a *Faretta* hearing in July 2021. *See* ECF No. 485. Each of these motions was filed *pro se* with the aid of Schulte's counsel at the time. For purposes of this motion, the Court holds that these admittedly unusual circumstances warrant excusing the untimely filing. It expresses no view on whether other untimely *pro se* filings in this action would warrant similar treatment.

and conservation of scarce judicial resources." *Benjamin v. Goord*, No. 02-cv-1703 (NRB), 2010 WL 3341639 (S.D.N.Y. Aug. 18, 2010) (internal quotation marks and citations omitted). It is appropriate only when a court has overlooked controlling decisions or facts put forward in the underlying motion which might have led to a different result. *See Cooper v. Lapra*, No. 18-cv-9405 (KPF), 2020 WL 7027592, at *1 (S.D.N.Y. Nov. 30, 2020) ("Compelling reasons for granting a motion for reconsideration are limited to 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'") (quoting *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992)). Although a defendant's *pro se* status compels the Court to construe his filing liberally in evaluating whether it has satisfied this standard, it has no effect on the substantive standard itself. *See Okparaeke*, 2019 WL 4233427, at *3.

Even construed liberally, Schulte's *pro se* filing fails to clear the high bar for reconsideration. Schulte identifies no authority that even purports to undermine the Court's prior decision that "the proper vehicle for a challenge to a BOP placement decision is a 28 U.S.C. 2241 petition brought as a separate civil action, not a motion filed in an underlying criminal case." *See* ECF No. 453. To the contrary, Schulte's cited authority reaffirms it. *See, e.g.*, *United States v. McGriff*, 468 F. Supp. 2d 445, 447 (E.D.N.Y. 2007) (construing a request made in the context of criminal action as a habeas petition and ruling accordingly). In determining the nature of a claim, courts do not rely on the "labels attached" to it, but rather "look to the substance of the remedy . . . sought." *Boudin v. Thomas*, 732 F.2d 1107, 1111 (2d Cir. 1984). Here, as the Court previously held and as Schulte freely admits, the instant motion is, both in substance and in style, a habeas petition. *See id.* ("[H]abeas corpus [is] the exclusive remedy for

prisoners challenging the fact or duration of their confinement.") (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

Although the Court does not hold today—nor did it hold in its prior Order—that it is barred from considering a habeas petition filed in the form of a criminal motion, it reiterates that the proper vehicle for such a petition is a separate civil action. Schulte has already brought at least two such actions, including one before this Court.[6] The Court has administratively closed that action, pending the forthcoming resolution of these criminal proceedings. *See* Case No. 19-cv-3346, ECF No. 11. If Schulte believes this decision was errant, or should now be revisited, the proper avenue is either (1) to pursue further appellate review; or (2) to move the Court, in the context of that action and subject to the relevant governing standards, to lift the stay.

## CONCLUSION

Schulte has not presented adequate grounds for reconsideration. Accordingly, the Court denies his motion. The Clerk of Court is directed to close the entry at ECF No. 456.

The Court also denies without prejudice Schulte's latest, as-yet-undocketed habeas motion, but does not rule on the motion for bail also contained therein. The bail application has yet to be fully briefed. The Government is directed to respond to the motion for bail by October 21, 2021.

Dated: New York, New York
October 6, 2021

SO ORDERED

Paul A. Crotty

HONORABLE PAUL A. CROTTY
United States District Judge

[6] The second habeas petition, Case No. 20-cv-9244, was dismissed in December 2020 by Judge Oetken.

# APPENDIX C

REHEARING DENIED

Note: Despite multiple requests, could not obtain a copy from the Court, but the docket is provided with the rehearing denial circled: ~~[illegible]~~ Dkt. 149

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of January two thousand twenty-tree,

Present: Barrington D. Parker,
Michael H. Park,

*Circuit Judges.**

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United States of America,

Appellee,

v.

Joshua Adam Schulte,

Defendant - Appellant.

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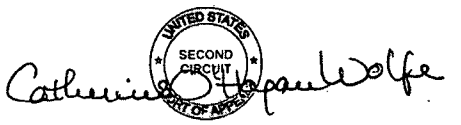
**ORDER**

21-2528 (L), 21-2529 (Con),
v. 21-2530 (Con), 21-2877 (Con),
21-2878 (Con), 21-2879 (Con)

Appellant, Joshua Adam Schulte, filed a motion for reconsideration and the panel that determined the motion has considered the request.

IT IS HEREBY ORDERED, that the motion is denied.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court




*Chief Judge Livingston has recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

† The other appeals with which 21-2877 is consolidated were dismissed in May 2022. 2d Cir. 21-2528 (L), doc. 189 (Or.).

MANDATE

S.D.N.Y. – N.Y.C.
17-cr-548
Furman, J.

# United States Court of Appeals
FOR THE
SECOND CIRCUIT

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Present:

Barrington D. Parker,
Michael H. Park,
*Circuit Judges.**

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United States of America,

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FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

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MANDATE ISSUED ON 02/03/2023

Additional material from this filing is available in the Clerk's Office.