

1990 WL 130555

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United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Maria Santos, Mother and Legal Representative of Santiago Santos, deceased; Laverne Barkley, Mother and Legal Representative of L.D. Barkley, deceased; Jomo Joka Omowale, a/k/a Eric Thompson; Vernon Lafranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George “Che” Nieves; James B. “Red” Murphy; Thomas Louk; Peter Butler; Charles “Flip” Crowley; William Maynard, Jr.; Calvin Hudson; Kimanthi Mpingo, a/k/a Edward Dingle; Kendu Haiku, a/k/a Willie Stokes; Ooji Kwesi Sekou, a/k/a Chris Reed; Phillip “Wald” Shields; Jerome Rosenberg; Alphonso Ross; Frank Lott; Gary Richard Haynes; Raymond Sumpter; Omar Sekou Toure a/k/a Otis McGaughey; Dacajeweah, a/k/a John Hill; and Johnnie Barnes, as the Administrator of the goods, chattels and credits which were of John Barnes, deceased, on behalf of themselves and all others similarly situated,  
Plaintiffs,

v.

The ESTATE OF Nelson A. ROCKEFELLER; Russell G. Oswald; T. Norman Hurd; Walter Dunbar; Wim Van Eekeren; John C. Miller; John S. Keller, Commissioner of Finance of Orange County, as the Administrator of the Estate of John Monahan; John C. Baker; A.C. O’Hara; Vincent Mancusi; Leon Vincent; Karl Pfeil; Robert F. Fischer; Dalton Carney; Henry Williams; J.C. Mochler; A.T. Malovich; Robert P. Quick; W.L. Shurter; K.E. Gellert; G.K. Elbet; T.N. Kruk; W.K. Dillon; M.K. Halloran; K.S. Crouse; R.J. Dwyer; P.P. Zelinski; G.R. Toray; J.B. Connell; B. Muthig; D.O. Parr; J.J. Patterson; J.W. McCarthy; D.O. Ellis; E.M. Byre; and John Does Nos. 1–100,  
Defendants.

CIV No. 75–132E.

#### Attorneys and Law Firms

Elizabeth Fink, Brooklyn, N.Y., Michael Deutsch, Chicago, Ill., for plaintiffs.

Joshua Effrou, Del Mar, N.Y., for Estate of Monahan.

Irving Maghrau, Buffalo, N.Y., for Pfeil.

John Steuger, Buffalo, N.Y., for Oswald.

Richard Moot, Buffalo, N.Y., for defendants.

#### MEMORANDUM and ORDER

ELFVIN, District Judge.

\*1 This is a civil rights class action suit arising out of an inmate uprising at the Attica (N.Y.) Correctional Facility (“Attica” or “the facility”) in September 1971. Defendant John S. Keller, as Administrator of the Estate of John Monahan, Deceased, has been substituted for defendant Monahan and presently moves this Court for summary judgment based upon Monahan’s qualified immunity.

The facts underlying this lawsuit are set forth in detail in a prior order of this Court and in the affirmation thereof by the United States Court of Appeals for the Second Circuit. *See Al–Jundi v. Estate of Rockefeller*, CIV–75–132E (W.D.N.Y. September 24, 1988), *aff’d*, 885 F.2d 1060, 1062–1065 (2d Cir.1989). For the purposes of the instant motion the facts are only briefly summarized.

On September 9, 1971 more than 1,200 Attica inmates rioted and occupied certain areas of the facility, taking numerous corrections officers as hostages. Several areas of the facility were re-captured that same day by other corrections officers assisted by State Police officers and the uprising was consolidated to certain limited areas, including an area known as “D–Yard.”<sup>1</sup> Negotiations between defendant Oswald (the former Commissioner of New York’s Department of Correctional Services) and the

inmates began September 9th and continued until September 13th, when Oswald's final plea to release the hostages was rejected. At that time, then-Governor Nelson A. Rockefeller authorized Oswald to order the State Police to retake the prison, with force if necessary.

The now-deceased Major Monahan devised and led the plan for recapturing Attica. At that time, Monahan was the Commanding Officer of A Troop of the New York State Police, headquartered at Batavia, N.Y. The facility was within the geographical area policed by A Troop. Monahan's plan to retake the facility proved successful inasmuch as the prison was recaptured, but at the expense of ten hostage and twenty-nine inmate lives.

This Court recently denied in part motions for summary judgment based upon claimed qualified immunity brought by Oswald and defendants Mancusi and Pfeil. See *Al-Jundi v. Estate of Rockefeller*, CIV-75-132E (W.D.N.Y. June 26, 1990). The legal standards for determining a motion for summary judgment based upon qualified immunity are set forth in detail in that decision (hereinafter "the June 26, 1990 Order"), at pp. 6-9, and are incorporated herein by reference. Essentially, this Court is again applying the standards enunciated in *Whitley v. Albers*, 475 U.S. 312 (1986), and developed during the preceding decades. Thus, while considering the need for application of force, the relationship between the amount needed and actually employed and the extent of injury inflicted, this Court must decide whether the evidence "viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness." *Id.*, at 322.

As explained in the June 26, 1990 Order, the Amended Complaint is divided essentially into three sections.

\*2 "The first deals with the plan to retake and the actual retaking of the prison, the second complains of the alleged 'reprisals' that occurred after the retaking and the third is concerned with the criminal prosecution of inmates for their participation and involvement in the events preceding and leading to the armed retaking."

With respect to the first section, Oswald's motion for summary judgment was denied because it was unclear whether Oswald had been woefully misinformed or recklessly indifferent to the specific details of Monahan's plan to re-take the facility. As such, a factual inquiry was necessary and summary judgment inappropriate. June 26, 1990 Order at p. 11. In the instant motion, Monahan's role in the plan to retake the facility is at issue. Because

Monahan was the drafter of the plan and actually led the re-capture, it is clear that he had either knowledge of or reckless indifference to the plan's details. As set forth below, this knowledge or indifference is found to rise to the level of creating an inference of wantonness, thus, compelling a denial of summary judgment.<sup>2</sup>

The plaintiffs allege that the plan designed by Monahan was "inadequate to protect the lives or safety of the plaintiff class, or to prevent widescale violence and brutality upon, retaliation against and suffering by plaintiffs \* \* \*" Amended Complaint, ¶ 37. Specifically, the plaintiffs alleged that the plan failed, *inter alia*, to provide adequate medical care to those injured, to "account for and counter the emotionally and racially charged atmosphere \* \* \* "; to "provide adequate command structure \* \* \* to prevent excessive use of force \* \* \*," to provide a system of warning plaintiffs that the use of deadly force was imminent, and to provide for means of surrender. Amended Complaint, ¶ 38. The plaintiffs further allege that Monahan "knew, or should have known, [that the plan] was calculated, either intentionally or with reckless disregard for the consequences, to cause excessive use of deadly force" and unnecessary suffering to the plaintiffs. Amended Complaint, ¶ 39.

As stated above, evaluating "the Monahan plan" with respect to the legal standards set forth in the June 26, 1990 Order leads this Court to find that the evidence will support a "reliable inference of wantonness in the infliction of pain." See *Whitley v. Albers*, *supra*, at 322. Monahan is claimed to have been the designer of the plan and was the leader of its implementation. If anyone was or should have been aware of the plan's components it was Monahan himself. Monahan knew how many officers were to converge upon D-Yard. He knew that the National Guard would assist therein, and that there would be sharpshooters on the C-Block roof to provide cover fire. He knew that the National Guard helicopter would drop tear gas and that police forces, accompanied by two corrections officers, would enter D-Yard thereafter. See Testimony of Monahan before the New York State Special Commission on Attica ("McCay Commission"), April 25, 1972 at p. 1604. Monahan had to have known or been recklessly indifferent to the fact that no real provision for medical care had been made. Similarly, Monahan had to have known or been recklessly indifferent to the facts that the plan failed to provide any warnings or ultimatums to the inmates and that, once the retaking was begun, no real chain of command would be in place. Thus, because Oswald—who was at best

misinformed as to the plan—was denied summary judgment based upon qualified immunity, this Court finds even more compelling the denial of summary judgment as to Monahan, who was the creator and actual leader of the plan. Given the tragic course of events marking the Attica recapture, this Court simply cannot find as a matter of law that there was no “wantonness in the infliction of pain” on the part of the individual personally responsible for drafting and carrying out the plan itself.

\*3 With respect to the second section of the Amended Complaint, Monahan’s role in the alleged tortuous reprisals is unclear, although it is of necessity strongly implied that the power used to retake the facility would have constituted the chain of power and command thereafter. Because further factual inquiry is necessary summary judgment would be improper. The motion is thus denied, as to such section also.

With respect to the third section of the Amended Complaint, Monahan appears to have had no role in any criminal prosecutions of inmates. Thus, the instant motion is granted with respect to such section only.

Accordingly, it is hereby ORDERED that the third section of the Amended Complaint is dismissed as to defendant John S. Keller, as Administrator of the Estate of John Monahan, Deceased, but that this defendant’s motion is otherwise denied.

**All Citations**

Not Reported in F.Supp., 1990 WL 130555

**Footnotes**

<sup>1</sup> Eleven hostages were rescued, one of whom later died of inmate-inflicted wounds.

<sup>2</sup> To the extent that there is any dispute whether Monahan drafted the re-capture plan, a factual inquiry would be necessary. Under these circumstances, summary judgment would be inappropriate, as well.