

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RALPH VALVANO, et al., :

Plaintiffs, :

70-C-1390

- against - :

BENJAMIN J. MALCOLM, Commissioner
of Correction of the City of New
York, et al., :

Defendants. :

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DETAINEES OF THE BROOKLYN HOUSE
OF DETENTION FOR MEN, et al., :

Plaintiffs, :

73-C-261

- against - :

BENJAMIN J. MALCOLM, Commissioner
of Correction of the City of New
York, et al., :

Defendants. :

September 9, 1975

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Appearances:

STEVEN A. HERMAN, ESQ.
MICHAEL B. MUSHLIN, ESQ.
JOEL BERGER, ESQ.
The Legal Aid Society
Prisoners' Rights Project
Attorneys for Plaintiffs

HON. W. BERNARD RICHLAND
Corporation Counsel of the
City of New York
Attorney for Defendants

By: DONALD J. TOBIAS, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

FIRST MEMORANDUM ON REMAND

After the Court of Appeals' decision of July 31, 1975, the parties conferred with this court concerning the procedure to be followed after remand. The Court of Appeals mandate was filed in this court August 21, 1975 in 73-C-261.

The Court of Appeals affirmed this court's finding that double celling of pretrial detainees is constitutionally impermissible. The Court noted that inadequacy of finances does not excuse a deprivation of constitutional rights. The Court acknowledged that it cannot require the City to raise necessary funds to build additional facilities, but stated:

We can, however, order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time.

The Court of Appeals remanded the proceeding to this court

to consider a proper remedy equitable to both the City and the detainees, keeping in mind the financial crisis facing the City and the practical considerations necessary to prevent the detainees from being transferred to distant facilities.

The Court of Appeals directed that both parties have an opportunity to make suggestions, "with the understanding that the City must act with reasonable promptness

to provide facilities for pretrial detainees consistent with their constitutional rights."

The Court of Appeals added that

Inaction . . . will not be tolerated nor will the present conditions be condoned.

At the conference Mr. Tobias suggested on behalf of the City that the court permit persons to be kept two in a cell for a period of 60 days at Brooklyn House of Detention for Men (BHD), because that is the situation which has existed during the stay of operation of this court's order of October 2, 1974, and he believes that no other solution is possible. He reported that the matter had been considered carefully by the Department of Correction, through its Director of Legal Affairs, its Chief of Planning, and its Director of Operations, as well as with the Wardens of Queens House of Detention for Men (QHD) and Brooklyn House of Detention for Men. QHD is substantially in compliance with this court's order, with only two people double celled without consent. In BHD there are approximately 230 persons now involuntarily double celled, using 115 of the 455 cells which are available for general population. The remainder of the cells in BHD were accounted for as occupied by sentenced prisoners working in the institution and special categories of inmates, or under repair. At any given time, 7 percent to 8 percent of the cells within the system are in

need of repair or in the process of being repaired and are not usable. This "down cell" figure is constant; as cells are repaired, others become uninhabitable.

Mr. Tobias argued that the 230 who are double celled represent only a fraction of the total annual population of BHD, considering that most persons received there are in and out within a few days.

New facilities for approximately 1,000 persons are under construction on Rikers Island (Project C-95) and are expected to be ready near the end of 1976; but there has been no determination yet concerning the use of the facilities, and no assurance of manpower to operate them.

Mr. Rosen, Director of the Board of Correction, pointed out that Bronx House of Detention has been partially closed, that the Adolescent Remand Center on Rikers Island has been closed, and that reopening these facilities would make additional cells available on a City-wide basis, but Mr. DeLare, Director of Operations of the Department of Correction, said that the budget did not permit reopening these facilities. At the time of the conference, the City was facing the strong possibility of default on obligations falling due during the month of September, and the inability to sell new bonds even through the Municipal Assistance Corporation.

Mr. Chagrin, Director of Planning for the

Department of Correction, is working on a master plan for the long range needs of the Department. He stated that there are approximately 1,000 persons in custody on a City-wide basis in default of bail in amounts of \$1,000 or less. Mr. Tobias stated that a plan for bail review, to reduce the population, had been submitted to the Administrative Judge of the state courts, but that no definite response had been received.

Discussion

While the Court of Appeals directed this court to give consideration to the City's financial crisis, it did not direct it to tolerate inaction or to condone present conditions. Modification of the present injunction so as to permit double celling for 60 days would be a retreat which is not in conformity with the action of the Court of Appeals.

Comparing the number double celled on a given day with the annual population is not a meaningful operation. Men should not be kept two in a cell for 60 days just because other men are released after only a few days of confinement.

Reduction of population appears to be necessary. Awaiting the completion of new facilities in late 1976 is not appropriate. Manhattan House of Detention for Men, now situated on Rikers Island, is filled to overflowing. Transfer of prisoners there would therefore be improper as well as detrimental.

The presentation by the City did not set forth how

many persons at BHD had been housed two in a cell for more than 30 days but less than 60 days, nor how many detainees at BHD are held in default of bail less than \$1,000.

The City's study and suggestions, having been prepared without consultation with defendants, and before any conference with the court, should not be taken as final.

The most leeway which seems tolerable to the court is to permit temporary continued double celling of persons who have been so housed for not more than 30 days, which conforms with what was permitted during the transition period under the order of October 2, 1974. The City's proposal practically ignores the Court of Appeals' affirmance of this court's findings and conclusions. If compliance with this limit requires reducing the population of BHD, this should be done by releasing the detainees for whom the lowest amounts of bail have been fixed and who have been confined for the longest time. Such a direction is proper as an exercise of the power which the Court of Appeals asserted. Slip op. 5291. The City defendants have had a reasonable time since this court's Memorandum of July 31, 1974 within which to prepare for compliance with the 30 day limit on double celling.


The City defendants should be required to submit a permanent plan for compliance with the prohibition against involuntary double celling within 60 days after the date of this Memorandum. A further conference on that plan, or a

formal hearing if requested by plaintiffs, will be held on November 19, 1975 at 4:00 p.m.

The selection of persons to be released should ideally be made by the state courts. This court's order will not prevent the state courts from adopting any different plan for the selection of detainees to be released.

The court will revise the plaintiffs' proposed interim judgment in conformity with this memorandum.

For the present, the court has eliminated the prohibition against transfers to other facilities, but at the conference on November 19th, plaintiffs may bring to the court's attention any abuse of the power of the Department of Correction to make transfers between institutions. Routine transfers may be permitted, but transfers intended to evade the limit on double celling may be prevented by appropriate language.


U. S. D. J.