UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

RALPH VALVANO, et al.,

Plaintiffs,

- against -

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

Defendants.

- x

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

Plaintiffs,

- against -

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

Defendants.

- x

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December 17, 1975

Appearances:

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Appearances (continued):

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J U D D , J.

SECOND MEMORANDUM ON REMAND

This memorandum deals with the program to remedy overcrowding at male adult pre-trial detention institutions, submitted to the court by the Corporation Counsel on November 10, 1975 on behalf of the City defendants, and with a proposed final judgment submitted by plaintiffs after they had reviewed the program of the City defendants. The court is faced with a difficult balancing of a variety of interests, which requires adding another to the series of memoranda already written in this civil rights case.

Facts

This court's First Memorandum on Remand, dated September 9, 1975, and the Interim Judgment based thereon, directed the City defendants to submit a permanent plan for

compliance with the prohibition against involuntary double celling within sixty days. The City defendants include the Commissioner of Correction, the Wardens of Brooklyn House of Detention for Men (BHD) and Queens House of Detention for Men (QHD), the Mayor and the Health Commissioner. This Second Memorandum on Remand deals with the defects asserted to exist in the City defendants' plan.

The court's original order to eliminate double celling, Memorandum and Order dated July 31, 1974, as subsequently amended, established a timetable for the elimination of double celling in BHD and QHD. The order directed that after September 1, 1974 no person be confined in a cell with another detainee more than thirty days without voluntary written consent of both, and that no detainee be confined in a cell with another person without such consent, beginning six months after the date of the memorandum, except for emergencies of not more than ten days certified by the Commissioner of Correction. The operation of the order was stayed pending the defendants' appeal.

The Court of Appeals by opinion dated July 31, 1975 (Detainees of Brooklyn House of Detention for Men v.

Malcolm, 520 F.2d 392), affirmed the findings of fact and conclusions of law and remanded the case to this court to fashion a remedy in the light of its opinion. The Court of Appeals clearly held that the remedy could include ordering the release of persons who were held under conditions which deprived them of their constitutional rights, even though the court could not "order the City to raise the necessary funds to build additional facilities." 520 F.2d at 399. This court was directed to keep in mind the City's financial crisis and the desirability of avoiding transfer of detainees to distant facilities, but it concluded

> "Inaction of course will not be tolerated nor will the present conditions be condoned."

Id.

The Interim Judgment on Remand, signed on September 9, 1975, directed the defendants to submit, within sixty days, a plan for the "immediate elimination of all overcrowding and double-celling" at BHD and QHD. Confining more than one detainee in a cell at QHD without voluntary written consent was forbidden immediately. During the preparation and consideration of the plan involuntary double celling was permitted at BHD for periods of up to thirty

days, with specified exceptions, and the Commissioner of Correction and the Wardens were directed to release on their own recognizance persons held for the longest time on the lowest bail, if compliance with the order could not otherwise be accomplished. Nevertheless, consistent with the view expressed in the accompanying Memorandum that the "selection of persons to be released should ideally be made by the state courts," the judgment provided

> "that any New York court of competent jurisdiction may specify a different method of selecting the persons to be released."

Although the interim order did not prohibit routine transfers to other facilities, the court stated in the accompanying Memorandum that it did not intend that transfers to already crowded facilities be used to evade the limit on double celling, or to reduce the need to develop a plan which would eliminate double celling. The court cautioned that the transfer of detainees to the Manhattan House of Detention for Men on Rikers Island which was already "filled to over-flowing", would be "improper as well as detrimental."

The Department of Correction Program

The program submitted by the Department of Correction at the expiration of the sixty day interim would extend indefinitely the right to keep two detainees in a cell for as long as thirty days and would extend that right to all institutions in the Department (in order to permit uniform practices throughout the Department). The defendants reported that in October, 1975, there were 2,594 cells available in five facilities for adult male pretrial detainees, and that the average number in the facilities was 3,305, city-wide, excluding 455 detainees who were housed in Ossining. Moreover, even with more effective utilization of available cell space, the Department could provide single celling only for detainees incarcerated more than thirty days.

The program described other relevant efforts including (1) the proposed establishment of a bail reevaluation project for Manhattan cases, (2) the adoption of standards and goals for the New York State courts, designed to reduce the time between indictment and trial, and (3) the prospective completion by December 1976 of the

C-95 project for additional housing facilities on Rikers Island for 1,016 detainees. However, the program pointed out that the Department of Correction had no present plans for utilizing the new C-95 Project, because of the fiscal crisis, which has reduced the Department staff by 648 since the beginning of 1975. The standards and goals adopted by the Administrative Board of the New York Judicial Conference contemplate reduction of the waiting time for trials by stages between October 1, 1975 and January 1, 1979.

The Department estimated that it would require an expenditure of $2,200,000 to reopen institutions presently not in operation in order to provide cell space sufficient to permit single cell occupancy for adults throughout the Department, and an additional $4,200,000 for adolescent detainees.

The Correction Department's program and the plaintiff's written objections were supplemented by discussion at a conference on November 19, 1975 attended by counsel and by Commissioner Malcolm in person together with Deputy Commissioner Jack Birnbaum, Director of Legal Affairs William Ritholz, and Planning Director Stuart Chagrin.

The defendants' representatives stated at that time that the Department had complied fully with the interim judgment, that there was no involuntary double celling at QHD and that no one had been so confined more than thirty days at BHD, transfers being effected to single cells after twenty-eight days.

Defendants also reported that no one had been released pursuant to this court's interim judgment. Although such releases might reduce the number of persons involuntarily double celled, the defendants' representatives referred to mechanical difficulties in determining which persons to release and the effect of detainers from other jurisdictions which prevent the release of some prisoners held on low bail. Deputy Commissioner Birnbaum estimated on the basis of discussions with the Pretrial Services Agency that approximately 250 detainees might be released as the result of bail review proceedings.

There was evident also a reluctance to release a detainee pursuant to a federal court order when a state court had directed the Commissioner to hold them until bail was posted.

The defendants referred at the conference to the fiscal difficulties of New York City, which was still staving off defaults on its obligations by complicated efforts every fewweeks. The defendants also referred to the fluctuating size of the population, which would make compliance with rigid requirements impracticable.

Plaintiffs insisted that double celling, which has continued more than a year after this court's original order on the subject, should be completely eliminated at once, and that constitutional conditions for detainees are an essential requirement that should not be sacrificed in budget cutting.

This court's ruling on double celling has been adopted as a part of Judge Lasker's recent order concerning Manhattan House of Detention on Rikers Island. Benjamin v. Malcolm, et al., S.D. N.Y., 75-Civ-3073, Memorandum of November 18, 1975 and Order of the same date. That order constitutes a preliminary injunction, the court having found that the relevant facts were undisputed and that the plaintiffs would probably prevail on the merits. In other words, double celling on Rikers Island is currently limited to

thirty day periods, pending final decision.

Shortly after this court's conference, disorders erupted in the Adult Detention Center on Rikers Island. The court has been informed of a hearing called by the Chairman of the New York City Board of Correction to consider the causes of the Rikers Island disturbances. His announcement of the hearing states

> "These lethal situations will inevitably reoccur unless fundamental changes are made in the City correction system from both the inmate and the correction officer points of view."

Since the conference of November 19th, the recently appointed Chairman of the State Commission of Correction, Herman Schwartz, has communicated to the court and counsel his view that the only way to reduce overcrowding in the correctional institutions and minimize risks both to detainees and to correction officers, is to release some of those who are currently being held on low bail.

This court's Memorandum and Interim Judgment of September 9, 1975 brought forth a substantial adverse public response in newspapers and radio and numerous letters to the court from members of the public and from grand jurors

associations. Most criticism, however, did not appear to recognize that the judgment concerned the rights of detainees awaiting trial, and did not appear to have been based on a reading of the underlying facts or legal authorities which led to the court's determination.

This court must decide the constitutional rights of pretrial detainees on the evidence before it and the applicable law.

Discussion

The release of persons detained under the conditions shown to exist at BHD and QHD was specifically contemplated by the Court of Appeals as one of the remedies within the power of the district court. In language already quoted in this court's memorandum of September 9, 1975, the Court of Appeals stated (520 F.2d at 399):

> "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."

Waiting until December, 1976, or later for the completion of the C-95 Facility, and its equipment and manning, would

be an unreasonable extension of unconstitutional conditions.

The City officials already have sufficient facilities to accommodate all detainees in single cells, if enough manpower is provided, even without making the changes in the "Tombs" which Judge Lasker found necessary in Rhem v. Malcolm, 371 F.Supp. 594 (S.D.N.Y.), aff'd, 507 F.2d 333 (2d Cir. 1974). If faced with the square alternative of opening additional cells or releasing detainees, the City defendants may find funds to provide for proper custody of the detainees. In any event, this court is not prepared to say that budget cuts made at the expense of the poor and the friendless justify indefinite delay in providing constitutional conditions of custody.

The court's stand is reinforced by a recent Court of Appeals decision. In Rhem v. Malcolm, _____ F.2d _____, decided December 5, 1975, this Circuit reaffirmed its view earlier expressed in Rhem v. Malcolm, supra, 507 F.2d at 341-42 and Detainees, supra, 520 F.2d at 399, that "an individual's constitutional rights may not be sacrificed on the ground that the City has other and more pressing priorities. . . . To do so would be to discriminate grievously against

poor persons who cannot afford bail. Presumed innocent in the eyes of the law, they are incarcerated solely to insure their appearance at subsequent proceedings. This limited deprivation of their liberty cannot be extended to justify the denial of other unrelated rights for budgetary reasons. See Shapiro v. Thompson, 394 U.S. 618, 633 (1969). Denial of the presumptively innocent detainee's constitutional rights represents an impermissible price to pay for his retention in custody."

The District Court of Massachusetts has rejected the idea of "randomly releasing inmates" in enforcing its order to terminate double celling, and directed instead that the county officials continue to fund a Bail Appeal Project. Inmates of the Suffolk County Jail v. Eisenstadt, 518 F.2d 1241, 1242-44 (1st Cir. 1975). Under the facts in the present case, however, directing release of those held under the lowest bail for the longest time would not interfere with the power of state courts any more than the normal exercise of a federal court's power to order release from state custody on federal habeas corpus. The state court still has the right to make its own selection of those to be released, if the provisions of this court's order are not satisfactory.

The inmates' temporary seizure of the Rikers Island institution is not to be condoned, and the destruction which ensued is inexcusable. Nevertheless, the Rikers Island incident emphasizes that unresolved grievances are a source of danger both to inmates and to correction officers, and that a federal court should not refuse to exercise its power to correct a grievance that it has found to be valid.

Correction officers are not represented directly in this action, although an observer was present at the latest court conference. Spreading out the same number of correction officers to cover more cells may not be an appropriate means of complying with this court's order, but good faith compliance with the order to terminate double celling should enhance the safety of correction officers as well as inmates.

The defendants' program represented only partial compliance with this court's directions to eliminate double celling. It was submitted in good faith, but the court finds that it is not adequate for the purposes stated. The proposal in the program to extend double celling to other institutions is based on a premise contrary to that of terminating it. Uniformity of departmental practice must yield to the basic policy of terminating double celling.

Fluctuations in inmate population can be covered by the ten-day emergency provision in this court's order. Recognition of emergencies does not mean, however, that the Commissioner may declare continuous emergencies.

It is necessary for the Commissioner and the Wardens to recognize that this court's order supersedes pro tanto the state court orders under which detainees in the plaintiffs' class have been placed in their custody. A certified copy of the partial final judgment in this case, accompanied by the Warden's certificate that the detainees released have been selected in accordance therewith, will satisfy his obligation to the state courts which committed the men. Mechanical difficulties in determining who has been held for the longest time on the lowest bail should not be unsurmountable. If there is an outstanding detainer, either release pursuant to that detainer, or release of another detainee without a detainer would satisfy this court's requirements.

It is almost a year and a half since this court's original order to terminate double celling. Some further extension of time may be justified in order to restore the

damages at Rikers Island and to confront the fact that this court's direction to end double celling means what it says, but that time should be brief.

The court will therefore direct compliance with the objectives of its Memorandum of Decision of July 31, 1974 in stages. The thirty day limit on involuntary double celling may be maintained in Brooklyn House of Detention for another two months or so, until February 29, 1976. Commencing March 1, 1976, a twenty day limit shall apply to involuntary double celling. Commencing June 1, 1976, all involuntary double celling must be eliminated, aside from exceptions permitted by the original order of July 31, 1974. Such elimination shall be accomplished by release of detainees as already set forth, if the proposed Bail Review Project does not result in sufficient reduction of population of the specified detention facilities.

Rather than attempt to rewrite the plaintiffs' proposed final judgment in conformity with this memorandum the court directs that plaintiffs settle a partial final judgment (since some issues still remain in the Valvano case) on three days notice.

U. S. D. J.