United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-2036

B
Pls

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

MARTIN SOSTRE, :

Plaintiff-Appellant, :

-against- :

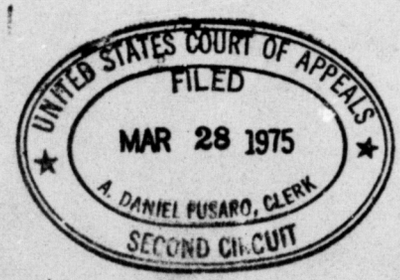
PETER PREISER, et al., :

Defendants-Appellants. :

----------x

APPELLANT'S APPENDIX

MICHAEL E. DEUTSCH
DENNIS CUNNINGHAM
Attorneys for Appellant
110 Pearl Street
Buffalo, New York 14202
(716) 842-1170



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Docket Sheet A-1

Order of March 6, 1975..... A-4

Opinion of the District Court A-6

DOCKET SHEET
73-CV-421

CIVIL DOCKET

UNITED STATES DISTRICT COURT

73-CV-

Jury demand date:

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
MARTIN SOSTRE, Plaintiff -against- PETER PREISER, Commissioner of New York State Department of Correctional Services; RUSSELL G. OSWALD, Former Commissioner of New York State Correctional Services; ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York; J. E. LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York, Defendants	For plaintiff: Dennis Cunningham Michael Deutsch 110 Pearl Street Buffalo, New York 14202
	For defendant: Louis J. Lefkowitz, Atty Gen. NY Capitol, Albany, NY (Timothy F. O'Brien)

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.
J.S. 5 mailed	Clerk				
J.S. 6 mailed	Marshal				
Basis of Action: civil rights	Docket fee				
	Witness fees				
Action arose at:	Depositions				
		A-2			

73-CV- 421

DATE 1973	PROCEEDINGS	Date Order Judgment N
ept. 18	(1) Filed civil rights complaint	
" 18	(2) " Memorandum-Decision and Order (9/14/73) directing Clerk to file complaint without fee. Plaintiff granted leave to proceed in forma pauperis and Clerk to issue summonses and complaints to Marshal for s[illegible] on named defendants witho payment of fees, and copy of summons and compla[illegible] be served on Atty Gen.St of NY, with copy of Memo-Decision and Order -HON. [illegible] PORT, USDJ	
" 18	Issued summons-original-5 copies & del:vd to Marshal for service	
Oct. 4	(3) Filed summons served on all parties	
ct. 11	(4) " Notice of Motion and Motion for Enlargement of Time to Answer, returnable October 22, 1973 at Utica	
" 29	(5) " Order(10/29/73) granting motion for enlargement of time-HON.E.PORT, USDJ	
" 29	Motion for enlargement of time. Call from T.O'Brien to submit answer to be served tomorrow	
"31	(6) Filed answer	
Nov.15	(7) " Affidavit of Franz S.Leichter	
Nov.11	(8) " Application for Temporary Restraining Order	
" 11	(9) " TRO unsigned	
" 11	Application for TRO. Adjourned without date. To be brought on by five day notice	
" 20	(10) Filed affidavit of Timothy F. O'Brien in opposition to application fo	
975 an. 15	(11) " Petitioner's affidavit in reply to defendant's opposing affidavit dated November 13, 1974	
Feb. 18	(12) Filed Order of Assignment of Dennis Cunningham and Michael Deutsch to represent plaintiff (2/14/75-HON.E. PORT, USDJ)	
" 21	(13) Filed Order fixing date for trial and for Writ of Habeas Corpus Ad Testificandum-Writ Issued and delivered to Marshal	
Mar.6	(14) Filed Order (3/6/75) denying motion for preliminary injunction and re plaintiff to custody of Supt. of Clinton Corr. Facility	
Mar. 4	Hearing on motion for preliminary injunction. Witnesses for petitioner-T	
" 5	Trial-hearing continued. Witness for plaintiff	
" 6	Trial continued. Preliminary injunction denied. Judge Port to enter ord	
" 7	(15) Filed Order (3/7/75) that remand is stayed to and until noon March 11 HON. E. PORT	
" 7	(16) Filed Order (3/7/75) with letter amending same attached	
" 7	(17) " Notice of Appeal	
" 14	(18) " Transcript of hearing on March 6, 1975.	
" 14	(19) " Envelope containing Petitioners Exhibits 1 thru 11	

ORDER OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, MARCH 6, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARTIN SOSTRE,

Plaintiff

-against-

PETER PREISER, Commissioner of New York State Department of Correctional Services; RUSSELL G. OSWALD, Former Commissioner of New York State Correctional Services; ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York; J. E. LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York,

Defendants.

73-CV-421

EDMUND PORT, Judge

ORDER

The court having dictated its Findings of Fact and Conclusions of Law on the record, and upon all of the proceedings had herein, it is

ORDERED, that the plaintiff's motion for preliminary injunction be and the same hereby is denied in all respects; and it is further

ORDERED, that the plaintiff be and he hereby is remanded to the custody of the Superintendent of the Clinton Correctional Facility, Dannemora, New York, and upon consent of the defendants herein, the above order of remand be and it hereby is stayed to and until noon on March 10, 1975.

Edmund Port
United States District Judge

Dated: March 6, 1975
Auburn, New York

OPINION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, MARCH 6, 1975.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- X

MARTIN SOSTRE,

Plaintiff,

- against -

PETER PREISER, Commissioner of New York State Department of Correctional Services; RUSSELL G. OSWALD, Former Commissioner of New York State Department of Correctional Services; ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility, Auburn, New York; J.E.LaVALLEE, Superintendent of Clinton Correctional Facility, Dannemora, New York,

Defendants.

Civil Action
73-CV-421

- X

The hearing in the above-entitled matter was continued at the Federal Building, Auburn, New York, before Honorable Edmund Port, on the 6th day of March, 1975, commencing at approximately 12:00 noon.

APPEARANCES:

MICHAEL E. DEUTSCH, ESQ. and
DENNIS CUNNINGHAM, ESQ.
Co-Attorneys for Plaintiff
Office and P. O. Address:
Dun Building
110 Pearl Street
Buffalo, New York

HONORABLE LOUIS J. LEFKOWITZ
New York State Attorney General
By: TIMOTHY O'BRIEN, ESQ.
Assistant Attorney General
Office and P. O. Address:
State Capitol
Albany, New York

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Gentlemen, since we recessed yesterday, I have reviewed my notes of the evidence, I have reviewed the exhibits, I have considered the memoranda submitted by the Plaintiff, and I have considered the arguments made by Counsel. Rather than delay on this motion for preliminary injunction, I will dictate my decision on the record and enter an order myself and file it with the clerk immediately afterward, based on that decision. This proceeding is an evidentiary hearing on the motion for preliminary injunction. The Plaintiff seeks to enjoin the Defendant, pending the trial of the action, from, one, enforcing any rule or regulation which would prohibit the Plaintiff from wearing a quarter-inch beard or, two, in the alternative, restraining the Defendant from continuing to punish the Plaintiff for violation of said rule or regulation by keeping him confined in the Isolation Unit known as Unit 14, and, three, restraining the Defendants from demanding the Plaintiff submit to a rectal search upon entering and leaving Unit 14. As a result of a pre-trial conference, the issues to be heard on this motion were confined to three. Those

issues were stated by me at the beginning of the trial as part of the background preliminarily to taking any evidence or hearing any argument. At all the times material here, the Defendants, Preiser and Oswald, were acting as or were former Commissioners of Correctional Services for the State of New York, and the Defendant Henderson and the Defendant LaVallee were respectively the Superintendents of the Auburn Correctional Facility and the Clinton Correctional Facility. The Plaintiff Martin Sostre, is confined presently in Clinton Correctional Facility in execution of a sentence of 25 to 40 years on a conviction of a violation relating to narcotics and assault. Pursuant to that judgment of conviction and execution of it, the Plaintiff has been confined in various State correctional facilities in New York since March 1968. In August of 1972, the Plaintiff was transferred to the Auburn Correctional Facility. From the Auburn Correctional Facility he was transferred to Clinton Correctional Facility. The Plaintiff, since on or about November 11, 1972, has been in the Special Housing Unit at either Auburn Correctional Facility or Clinton Correctional Facility. The confinement in Special Housing Units

was as a result of charges alleging violations of rules and regulations of the institutions. And examination of the Plaintiff's record within the institutions indicates that a great majority of his confinements in Special Housing results from actions of the Adjustment Committee directing that he be confined in those units for periods of seven days at a time, and the majority of the charges for which the Adjustment Committee ordered his confinement related to the Plaintiff's refusal to remove his beard when requested to do so at each of theseweekly sessions with the Adjustment Committee. He finds the requirement concerning the limitation on beards and mustaches unconstitutional and particularly as applied to him. The rule with reference to hair which the Plaintiff is charged with violating limits the length of hair on the head, which isn't pertinent in this case. It also limits the growth of sideburns, which is not involved, and it limits hair growth on the face to mustaches not extending beyond the corners of the upper lip. The mustache and beard worn by the Plaintiff has been described as a goatee, which I personally don't think adequately describes it. It is a beard of unusual contour, running from the tips

of the mustache down the side of the face joining the lips and chin and comprising a thin maybe half-inch width of growth of hair following the chin and jaw line. My description, as I look at the Plaintiff leaves much to be desired, and I think that the best way to describe the facial adornment of the Plaintiff is by reference to Exhibit 1 which was a photograph which the Plaintiff testified is an enlargement of one taken while he was confined at Wallkill, and which is substantially the fashion in which he has kept his mustache and beard during all of the time pertinent here. The Plaintiff states without any dispute that the beard, mustache as substantially shown in Exhibit 1 has been worn by him during the entire period with which we are concerned. Confinement in Special Housing results in a number of restrictions and deprivations not conferred on inmates in the general population of the prison. These additional deprivations and restrictions in a prison environment are of a substantial nature to a person so confined. The nature of the deprivations can be minimized, although not every deprivation obviously rises to the stature of the constitutional deprivations. For example, I had one case where candy bars, some

kind of snack, a prison official ran out of in the yard, and the fellow went to get one in the corridor where other people get them, and they wouldn't give it to him in the corridor, and, of course, we are plagued with all sorts of cases like that, but it does demonstrate the small things that become important in a prison environment. It also occupys considerable time of this court unnecessarily, I might add, because on the face of it, a claim such as that is without merit, but I don't imagine the Plaintiff in that case ever would be convinced of it. The Adjustment Committee, pursuant to whose order the Plaintiff was confined for a great deal of this time -- has been confined in Special Housing -- is the initial and least formal of the institutional procedures dealing with alleged misbehavior of inmates or with convicts needing correction. The functions of the committee are four-fold and are set forth in detail in part 252 of chapter five, volume seven, Correctional Services, Code, Rules and Regulations of the State of New York, and the roll of the committee, as set forth there is to ascertain the full and complete facts and circumstances of the incidents of misbehavior alleged in reports to the superintendent

to ascertain the underlying causes of each such incident, to take appropriate steps to secure future compliance by such inmates with the policy of the department, and to recommend to the superintendent such changes in programs or procedures of the facility as may seem desirable in order to eliminate, to the extent practical, factors that tend to contribute to the causes of inmate misbehavior or to improve the methods of dealing with the same. An elaborate procedural format was set out in the regulations for the operation of the Adjustment Committees. The dispositions permitted to an Adjustment Committee range from recommending to the superintendent that the report of misbehavior be nullified to confinement in Special Housing for not more than seven days, with the right to recall the inmate within that period or at the expiration of the period for further conference and disposition and reevaluation. On that recall and reevaluation, the committee is authorized to make any disposition that is permitted under the rules. As I indicated, this has been a merry-go-round, in large part, of seven-day confinements to Special Housing for failure to abide by the beard regulation, a recall, a request to abide, refusal and a reimposition, and

it's been going on now for a considerable period of time. The Commission, in treating individual inmates, can make recommendations for changes in programs and procedures of the institution based on the information developed in the course of their work. A more formal method of charging the inmate with a violation of the rules and regulations and the next step in the hierarchy of -- I don't know what you call it -- internal law or internal structure of the prison -- the next step in the hierarchy is an administrative -- before I get to that, I was thinking of a superintendent's proceeding, but before we get to that, I think I should note -- it might save some trouble knowing what to look for -- that there is an administrative procedure provided in the regulations for the review of the Adjustment Committee's disposition, and that this review can be initiated at the instance of the inmate as well as by the superintendent, and in some instances, the review is mandatory. The next step would be a more formal charge in the nature of a superintendent's proceeding. More severe penalties can be imposed on a finding of guilty in such a proceeding, and, in addition to the difference of the way of penalties, by way of length of time and loss of privileges and

so forth, a finding of guilty in a superintendent's proceeding may also carry with it a loss of good time, from my experience in prison cases, a valuable asset in the holdings of any inmate, that is, the good time allotment, I don't mean the loss of it. An Adjustment Committee disposition can not result in the loss of good time. Until December 1974, any movement of an inmate in or out of the Special Housing Unit required a strip frisk which included a rectal examination. The rectal examination is confined to a visual examination conducted by requesting the examinee to bend forward and to spread the cheeks of his buttocks to allow a free view of the external portion of the anus. In December 1974 this was modified in some institutions. Movements where the inmate was kept in handcuffs and a belt restraint -- this was done by an order of the superintendent at Dannemora, and it covered visits to hospital or doctor or dentist, instances where the inmate was restrained by handcuffs, as far as I recall. The Plaintiff since his confinement in Special Housing has refused to submit voluntarily to the rectal search that I have described, and in instances where his removal from the institution was not obligatory or felt to be obligatory, there

was no search conducted, and the inmate was required to remain within the Unit. In instances where he was obliged to leave the institution, pursuant to his necessary appearance in court, on his refusal to submit to such an examination, the search was conducted by the application of force. On the occasions when the Plaintiff refused, he stated his response that he felt the search was degrading. I think in some instances, he cited a case so holding, although I think he reads the case wrong, as does his Counsel in their memorandum of law, and he also, I believe on occasions, stated that he felt that the procedure was unconstitutional and therefore he resisted it. On some occasions, the involuntary search was conducted by officials, the Plaintiff states although, of necessity, by force, without an assault. On other occasions, he terms the examination resulting from assault. All the words that have been spilled in this courtroom including mine are more than amply summed up by what I have just described, as for the purpose of getting to the issues that a pre-trial conference determined worthy issues. We now come to the questions of law involved. With reference to the beard, the Plaintiff obviously contends there is no rational

basis for such a rule in a prison environment. Of course, all of this has to be judged by the circumstance and the environment in which it's being applied. The testimony of the Defendant is that the rule is necessary as an aid to identification, and the officer in charge of security in Dannemora testifies that the chin structure and cheek bone are critical points in identifying individuals. He also cites hygienic reasons. Of course, by coincidence we have got right here in the City of Auburn one of the demonstrations of the problems that arise from the hygienic standpoint. Our schools, public and parochial schools, were closed yesterday for a number of days in order to clear up a lice infestation that's been spreading among the school children and teachers. I suppose I can't deny to know as a Judge what's so apparent to me as a man and a resident of Auburn, but I am not concerned with or can I be concerned particularly with what I think about the reasons for the rationale for these rules. I'm concerned with whether or not there is a reason, and if it has a resonable relation to the purpose, the purpose, of course, being security in the institution, and other than that, security and health. I think the health measure

could probably be done, although it wouldn't be very pleasant, like is being done in the city here, except you can't close Auburn prison. We can close our schools down and make the kids and teachers get deloused; but it presents a problem, there is no question, if this infestation somehow was spread from a pupil to a guard or to an inmate on forlough working in one of the hospitals here in Auburn, so that it's not irrational even on a hygienic basis in a closed society, but going beyond the reasons, I'm constrained for a much more solid reason. I think it's beyond the point where I need or should, in fulfillment of my duty, consider beyond the decided cases. I decided a case arising in Auburn Prison involving hair and beards and held that it didn't rise to a constitutional violation. A quote from my very short recommendation and order was as follows: "The chief complaint is that the Plaintiff's are being excessively punished for wearing beards or goatees. Injunctive relief is sought enjoining the punishment for the wearing of beards or goatees, together with declaratory relief concerning the institutional rules prohibiting beards and goatees at the institution. The Plaintiffs also seek exemplary damages. The claim does not in my opinion

present a Federal constitutional question justifying Federal interference in the operation of the State prisons.", and I cite Blake against Bryce, 418 (444 F 2d) 218, Eighth circuit, 1971, and Williams v. Batton, 342 F Sup. 1110 (EDNC) 1972. I also cite a case decided by Judge Foley, Barnes against Bryce. That case was appealed to the Court of Appeals, and it was confirmed without opinion in 495 F 2d 1367. On the basis of that case alone, I could feel constrained to find if I had to on the basis of record, and I don't have to at this juncture, and I'm not so finding -- but on the basis of that case at the present time, I feel I would not be obliged to find such a regulation not to be constitutionally prohibitive. It's importance in this procedure, of course, is that, in view of that case, I can't see how the Plaintiff has established, with reference to the beard, the likelihood of success to merit preliminary relief. I am taking note of the hair cases cited by the Plaintiff, but I don't find any to deal with a confined, sentenced prisoner or maximum security prison. Counsel cites high school students, Duane against Barry in this circuit which involved the Nassau Police Department, Richardson against Thurston, a student case. The

closest we come to jail cases is Seale against Manson in Connecticut, and at that juncture, the Plaintiff was a pre-trial detainee, as was the only other hair case, or the only prison hair case that I had -- it's the only one that is cited that deals with a prisoner -- no, excuse me, there is. The Plaintiff also cites Christman vs. Skinner in '67 misc. 2d 232 in Supreme Court of Monroe County, but failed, as I indicated to Counsel yesterday, to indicated to the Court that the case was reversed and dismissed as moot in 388 2d 884, and I think in fairness that it should be noted that Judge Del Vecchio wrote a good decent. We next come to the question of disparity between the punishment and the offense. Of course, it's hard for an outsider to judge the scale and degree of seriousness of an offense within a prison, and that's one of the problems of this whole mass of litigations, that judges are not equipped by training or in any other way, to appraise jails or prisons. We just don't have that kind of experience and background, and I might just as well try to operate a clothing store. I could do a better job. My father was a tailor, and I worked in his shop, but I don't know, and neither do other judges know the day-to-day operation of prisons.

However, I am able to make this observation, that apparently the fact that the authorities have treated this through the Adjustment Committee might indicate that it doesn't rise high on the scale of serious offenses within the prison community, or it may be that, in view of the Plaintiff's position, they feel that it would serve no greater purpose and it would be more severely punitive if they were to treat this on each instance as a superintendent's proceeding, which could involve loss of good time. I have no way of knowing that, but, in any event, this is not, to my mind, what Counsel indicated to be a blanket punishment for an incident after an offense. This isn't a case of a man getting a long confinement sentence by reason a traffic violation. This appears to me more like the case of the persistent traffic violator, that is, he exceeds the speed limit today and he exceeds the speed limit next week, and it's a week each time for exceeding the speed limit. True, that mounts up if he is going to speed every week, but I don't view it in the light of a cumulative sentence. I think maybe a different example would be more significant. Take the case of an addict. A narcotics addict, upon entering the United States is obliged to file a statement that

he is an addict. I cite this because I was involved in such a case. The fellow comes into the community, and he is convicted of such and such a violation. He is given a relatively modest sentence, and he is a citizen, but goes up to Canada, and while he is in prison, the immigration authorities visit him. You know, you have got to have this certificate. Now, here is a form you can use. Here is an immigration form. If you go up to Canada and come back, you can fill this out so you can present it at the board, and they give him a form. That's analogous to the board telling Mr. Sostre, "The rules require you to shave your beard." The man comes across the border a couple weeks later without filling out the form, and this could go on interminably. Now we come to the rectal search. I have had no memoranda from the Defendants, so I am on my own there. The Plaintiffs have given me a memorandum which deals in general language with the rectal search, but not with the rectal search in a prison environment, except for Mr. Sostre's own case from Judge Motley where he made a claim similar to the claim that's being made here, but unfortunately, Judge Motley's opinion, as you are all well aware, was reversed, and more significant was the fact

I searched Judge Motely's opinion to find the language attributed to the rectal search, that is, the language that Counsel have attributed to the rectal search, and as I read the case, the language that they put in quotes, "physically harsh, destructive to morale, dehumanizing, in the sense that it is needlessly degrading," as found on 312 Federal Sup, and the introductory part of the sentence quoted is not as the brief indicates. I am not quoting from the brief. Judge Motley found that automatic rectal search is a part of the rules of solitary confinement, without any belief of contriband being concealed. That was part of a quote. Now, that language is no where to be found. Judge Motley was talking about the segregation at that point, so that again you might better have not had that, but the more important thing is that I searched Judge Motely's opinion, not looking to this lack, but to see what she said about the rectal search, and she didn't enjoin it, although that was part of the relief sought, and, of course, the Court of Appeals didn't even mention it, except I think there might have a passing phrase. Now, the other case that came before Judge Curtin was, as indicated, a visitor. Well, I think there is a vast difference

between a visitor and a person confined in Section 14. As I say, there are no cases of rectal searches of confined prisoners or particularly prisoners confined in segregated units cited. The only cases that I have been able to find are Dougherty against Harris, 476 Fed Sup 292 (2d Circuit 1973) search denied, 414 US 872, which found the strip search to be constitutional, and that dealt with a prisoner in a Federal prison. The other case that I was able to find -- there may be more, it's been a hasty research job -- were Knuckles against Prasse, that was in the Eastern District of Pennsylvania in 1969 302 F Sup 1036, affirmed in 435 Fed 2d,1255 (3d Circuit) searched denied, 403 US 936 which dealt with a Pennsylvania state prison. In the light of those cases, I think that I must find the Plaintiff has failed to show probable success on the merits and irreparable injury. The motion for preliminary injunction is denied. Now, I think in passing, because of the length of the apparent confinement here I should note that the Plaintiff was out of segregation, not in the general population, but in other institutions, while awaiting to testify or to have cases of his heard, from May 19, 1973 to June 5, 1973, and from December 18, 1973 until

September 4, 1974, and from January 24 this year, in relation to a case in Plattsburgh and this case to the present time. I put those facts on the record so that we won't have to search the record later for that information. Now, of course I can't tell the Plaintiff what to do. I can tell the Plaintiff this: That in this Court where inmates have to refused to comply with some regulations, I think I have told you before, in this particular instance it was dressing for Court, that I have counseled the authorities and they followed my advice against using any force, but that merely let the man stay where he is and report to the Court. I will take the testimony. That's his option. I also recall on that occasion looking up the law, and this is a civil action, and in the civil action there is no requirement that the Plaintiff be present. If the Plaintiff wants to absent himself, he can do that. I'd prefer that he absent himself rather than have any violence or force. His testimony can be taken in the prison by deposition, if it's necessary. The Court dosen't have to be present. I think that the Plaintiff should be mindful that even a criminal case, in some instances, you can waive your right, your constitutional right to be

present and confront the witnesses even. Now, I don't know that that disturbance has to take place in the Court. I know that I would go to great lengths to avoid having force used on a man to enforce any regulations. Now, I will enter an order, a search order based on my decision, denying the preliminary injunction. I won't ask him if he had difficulty getting here this morning because of a snow storm in Watertown. He's got to return the prisoner to Watertown. I will direct that you return the prisoner to State authorities at Dannemora not later than 12 o'clock noon tomorrow. That will give Counsel an opportunit to apply for a stay or for any other relief to the Court of Appeals.

MR. CUNNINGHAM: Your Honor, we will have to ask for a little more time than that.

THE COURT: No, you can do it.

MR. CUNNINGHAM: No. Noon tomorrow, it's impossible for us to travel all that way and get a hearing.

THE COURT: Well, you can do it quite informally. You may be able to get -- we now have a judge in Rochester. I don't know

whether a judge can issue it or whether it takes a Court order, but those are things you have to know.

MR. CUNNINGHAM: I think it has to be taken to the Court, Your Honor.

THE COURT: Well, whatever it is, you can be in New York in the middle of the afternoon.

MR. CUNNINGHAM: No, Your Honor. We are going to drive there.

THE COURT: Well, I don't know of any law that says you can't fly.

MR. CUNNINGHAM: The law of finance, Your Honor, the law of money.

THE COURT: Well, that's your relief.

MR. CUNNINGHAM: Is the Court unwilling --

THE COURT: Of course, I have the same situation in the moving papers before Judge Foley. I find that this performance was gone through before Judge Stewart in the Southern District and it didn't serve any purpose.

MR. CUNNINGHAM: I dontt understand, Your Honor.

THE COURT: It's substantially the same kind of an application that was made. You can make it.

MR. CUNNINGHAM: We would like, Judge, to have -- I am to go to the secretary and ask him to stay -- write an injunction ending a rule under rule 62, and we would like to bring an application to him in an orderly fashion, and if the Plaintiff is to be returned to Watertown, it seems to me it's possible to leave him there long enough to give us a chance to go to Court down there. Maybe Counsel doesn't have any objection.

MR. O'BRIEN: To stay?

THE COURT: I can't honestly answer that today in view of my findings.

MR. CUNNINGHAM: Well, I would certainly -- on one occasion before, I think I had about the same time to apply to the Circuit Court for an application for a stay.

THE COURT: Well, I never worried about money with the State of New York.

MR. O'BRIEN: Well, these people brought fellows from Washington D.C., and they brought a psychiatrist.

THE COURT: The cry of poverty doesn't ring true. It doesn't ring true, Counsel.

MR. CUNNINGHAM: Your Honor, this Court knows, and certainly Mr. O'Brien knows, we had no funds whatsoever.

THE COURT: Well, as far as the Plaintiff is concerned, I will have no hesitancy in certifying that this is a substantial question, and the appeal is taken in good faith because I feel it is, but I think you can accomplish whatever you can accomplish in that time that it takes. If the State authorities were agreeable, of course, I'd have no objections, but in the absence --

MR. CUNNINGHAM: (Interrupting) We call upon them to, Your Honor, issue an order putting in on Friday, Judge.

THE COURT: The next fellow that comes in front of me, I may require the same requirement that I required in order not to have Mr. Sostre returned to Dannemora. I have got more than one case to contend with, and more than one Plaintiff. The next fellow may be equally meritorious, and it might be equally advantageous to work

something out with the State.

MR. CUNNINGHAM: Well, we would ask Mr. O'Brien please to agree that the Court order should not take affect until then so we have time to go to the circuit without breaking our neck.

THE COURT: Well, the trouble with that is what have you got to go on, if I don't file the order?

MR. CUNNINGHAM: Well, Your Honor, if he agrees to stay the order he can obtain that agreement and their mandate can be stayed until Monday.

THE COURT: If that's agreeable, I will enter an order this afternoon effective as of Monday. Now, you are going to have the same -- what is today, Thursday?

MR. CUNNINGHAM: Thursday. So that we would have time to set it up, Judge, and it could be heard Monday, and whatever action that would be taken, would be taken Monday.

THE COURT: I have no objection.

MR. O'BRIEN: If the Court please, I would have to consult with my clients.

THE COURT: We will ask you to consult with whoever you need to consult with. Can you do that by phone now? You can go in to my secretary and she can get you whoever you want to talk to, so that you will have privacy.

MR. O'BRIEN: We would consent to the Petitioner being kept at Jefferson County.

THE COURT: Jefferson County. That's the only jail we have a contract with that doesn't require a rectal search.

MR. CUNNINGHAM: Until Monday?

MR. O'BRIEN: Until Monday.

THE COURT: I don't think it's unreasonable, but I am not going to impose because I don't think much would come of it.

(Whereupon, a short recess was taken at 1:10 p.m. and the proceedings resumed at 1:25 p.m.)

THE COURT: At the suggestion of Defense Counsel and at the request of the Court, Defense Counsel has called the authorities within the Correction Department and they have no objection to the entry of an order remanding the Plaintiff

to the authority at Dannemora Correctional Facility effective at noon Monday, March 10.

MR. CUNNINGHAM: Your Honor, I think Your Honor's order ought to specify remanding him to the authority of the Department of Correction so they could do what they want with him at that point.

THE COURT: I am not going to have them take him to the Commissioner's office. They can do what they please, and they know it, and I think -- this is again aside -- but I think it demonstrates the effectiveness of a resonable request over the beligerency of a fight. Here is something that the Court would only do on consent, and it took nothing more than a simple reasonable request to accomplish, whereas litigation, we'd all be in the Court for six months. Now, while I am talking I think I should supplement the record because my clerk called my attention to the fact that while I gave the citation of the case that was affirmed by the higher Court, I did not give the name. It's Sekou, also known as Chris Reed et ano, against Robert J. Henderson. It's 73-CV-543, Northern District of New York, affirmed 495 F 2d 1367 (2d Circuit 1974). There is one other thing

that I may have omitted because I think it's quite obvious in the case that I have cited to rely on as a rationale, but that the Plaintiff's witness was but an authority of the Defendant, the Assistant to the Deputy Warden, and gave as the reason for the search, of course, security, because experience has shown that absent the search, instruments or other material could be secreted. I will enter an order in accordance with the decision I have dictated on the record. Make it effective -- that is making the remand part, the remand of the Plaintiff, effective at noon Monday, March 10.

(Whereupon, at 1:40 p.m., the Proceedings in the above-entitled matter were concluded.)