

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,

73-CV-421

Defendants.

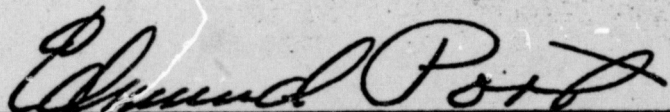
EDMUND PORT, Judge

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.


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.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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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.

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Civil Action
73-CV-421
U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
MAR 14 1975

AT 12 O'CLOCK
LE R. SCULLY, Clerk
UTICA

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.

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APPEARANCES:

MICHAEL E. DEUTSCH, ESQ. and
DENNIS CUNNINGHAM, ESQ.
Co-Attorneys for Plaintiff
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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

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

1 was as a result of charges alleging violations of
2 rules and regulations of the institutions. And
3 examination of the Plaintiff's record within the
4 institutions indicates that a great majority of
5 his confinements in Special Housing results from
6 actions of the Adjustment Committee directing that
7 he be confined in those units for periods of seven
8 days at a time, and the majority of the charges
9 for which the Adjustment Committee ordered his
10 confinement related to the Plaintiff's refusal to
11 remove his beard when requested to do so at each of
12 these weekly sessions with the Adjustment Committee.
13 He finds the requirement concerning the limitation
14 on beards and mustaches unconstitutional and
15 particularly as applied to him. The rule with
16 reference to hair which the Plaintiff is charged
17 with violating limits the length of hair on the
18 head, which isn't pertinent in this case. It also
19 limits the growth of sideburns, which is not in-
20 volved, and it limits hair growth on the face to
21 mustaches not extending beyond the corners of the
22 upper lip. The mustache and beard worn by the
23 Plaintiff has been described as a goatee, which I
24 personally don't think adequately describes it. It
25 is a beard of unusual contour, running from the tips

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

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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

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

1 it's been going on now for a considerable period of
2 time. The Commission, in treating individual inmates,
3 can make recommendations for changes in programs and
4 procedures of the institution based on the informa-
5 tion developed in the course of their work. A more
6 formal method of charging the inmate with a violation
7 of the rules and regulations and the next step in
8 the hierarchy of -- I don't know what you call it --
9 internal law or internal structure of the prison --
10 the next step in the hierarchy is an administrative
11 -- before I get to that, I was thinking of a super-
12 intendent's proceeding, but before we get to that,
13 I think I should note -- it might save some trouble
14 knowing what to look for -- that there is an
15 administrative procedure provided in the regulations
16 for the review of the Adjustment Committee's
17 disposition, and that this review can be initiated
18 at the instance of the inmate as well as by the
19 superintendent, and in some instances, the review
20 is mandatory. The next step would be a more formal
21 charge in the nature of a superintendent's proceed-
22 ing. More severe penalties can be imposed on a
23 finding of guilty in such a proceeding, and, in
24 addition to the difference of the way of penalties,
25 by way of length of time and loss of privileges and

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

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

1 basis for such a rule in a prison environment.
2 Of course, all of this has to be judged by the
3 circumstance and the environment in which it's being
4 applied. The testimony of the Defendant is that
5 the rule is necessary as an aid to identification,
6 and the officer in charge of security in Dannemora
7 testifies that the chin structure and cheek bone
8 are critical points in identifying individuals. He
9 also cites hygienic reasons. Of course, by coin-
10 cidence we have got right here in the City of Auburn
11 one of the demonstrations of the problems that
12 arise from the hygienic standpoint. Our schools,
13 public and parochial schools, were closed yesterday
14 for a number of days in order to clear up a lice
15 infestation that's been spreading among the school
16 children and teachers. I suppose I can't deny to
17 know as a Judge what's so apparent to me as a man
18 and a resident of Auburn, but I am not concerned
19 with or can I be concerned particularly with what
20 I think about the reasons for the rationale for
21 these rules. I'm concerned with whether or not
22 there is a reason, and if it has a reasonable rela-
23 tion to the purpose, the purpose, of course, being
24 security in the institution, and other than that,
25 security and health. I think the health measure

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

1 present a Federal constitutional question justifying
2 Federal interference in the operation of the State
3 prisons.", and I cite Blake against Bryce, 418
4 (444 F 2d) 218, Eighth circuit, 1971, and Williams
5 v. Batton, 342 F Sup. 1110 (EDNC) 1972. I also
6 cite a case decided by Judge Foley, Barnes against
7 Bryce. That case was appealed to the Court of
8 Appeals, and it was confirmed without opinion in
9 495 F 2d 1367. On the basis of that case alone,
10 I could feel constrained to find if I had to on
11 the basis of record, and I don't have to at this
12 juncture, and I'm not so finding -- but on the basis
13 of that case at the present time, I feel I would not
14 be obliged to find such a regulation not to be
15 constitutionally prohibitive. It's importance in this
16 procedure, of course, is that, in view of that case,
17 I can't see how the Plaintiff has established, with
18 reference to the beard, the likelihood of success
19 to merit preliminary relief. I am taking note of
20 the hair cases cited by the Plaintiff, but I don't
21 find any to deal with a confined, sentenced prisoner
22 or maximum security prison. Counsel cites high
23 school students, Duane against Barry in this circuit
24 which involved the Nassau Police Department,
25 Richardson against Thurston, a student case. The

1 closest we come to jail cases is Seale against Manson
2 in Connecticut, and at that juncture, the Plaintiff
3 was a pre-trial detainee, as was the only other
4 hair case, or the only prison hair case that I had
5 -- it's the only one that is cited that deals with
6 a prisoner -- no, excuse me, there is. The Plaintiff
7 also cites Christman vs. Skinner in '67 misc. 2d
8 232 in Supreme Court of Monroe County, but failed,
9 as I indicated to Counsel yesterday, to indicated
10 to the Court that the case was reversed and dismissed
11 as moot in 388 2d 884, and I think in fairness that
12 it should be noted that Judge Del Vecchio wrote a
13 good decent. We next come to the question of
14 disparity between the punishment and the offense.
15 Of course, it's hard for an outsider to judge the
16 scale and degree of seriousness of an offense within
17 a prison, and that's one of the problems of this
18 whole mass of litigations, that judges are not
19 equipped by training or in any other way, to appraise
20 jails or prisons. We just don't have that kind of
21 experience and background, and I might just as well
22 try to operate a clothing store. I could do a
23 better job. My father was a tailor, and I worked
24 in his shop, but I don't know, and neither do other
25 judges know the day-to-day operation of prisons.

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

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

1 I searched Judge Motely's opinion to find the
2 language attributed to the rectal search, that is,
3 the language that Counsel have attributed to the
4 rectal search, and as I read the case, the language
5 that they put in quotes, "physically harsh, destruc-
6 tive to morale, dehumanizing, in the sense that it
7 is needlessly degrading," as found on 312 Federal
8 Sup, and the introductory part of the sentence
9 quoted is not as the brief indicates. I am not
10 quoting from the brief. Judge Motley found that
11 automatic rectal search is a part of the rules of
12 solitary confinement, without any belief of contri-
13 band being concealed. That was part of a quote.
14 Now, that language is no where to be found. Judge
15 Motley was talking about the segregation at that
16 point, so that again you might better have not had
17 that, but the more important thing is that I searched
18 Judge Motely's opinion, not looking to this lack,
19 but to see what she said about the rectal search,
20 and she didn't enjoin it, although that was part
21 of the relief sought, and, of course, the Court of
22 Appeals didn't even mention it, except I think there
23 might have a passing phrase. Now, the other case
24 that came before Judge Curtin was, as indicated,
25 a visitor. Well, I think there is a vast difference

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

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

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

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

18 THE COURT: No, you can do
19 it.

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

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

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

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

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

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

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

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

15 THE COURT: Well, that's
16 your relief.

17 MR. CUNNINGHAM: Is the
18 Court unwilling --

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

24 MR. CUNNINGHAM: I don't
25 understand, Your Honor.

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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.

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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

1 something out with the State.

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

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

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

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

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

22 THE COURT: I have no
23 objection.

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

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

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

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

12 MR. CUNNINGHAM: Until
13 Monday?

14 MR. O'BRIEN: Until Monday.

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

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

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

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

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

8 THE COURT: I am not going
9 to have them take him to the Commissioner's office.
10 They can do what they please, and they know it,
11 and I think -- this is again aside -- but I think
12 it demonstrates the effectiveness of a reasonable
13 request over the belligerency of a fight. Here is
14 something that the Court would only do on consent,
15 and it took nothing more than a simple reasonable
16 request to accomplish, whereas litigation, we'd
17 all be in the Court for six months. Now, while I
18 am talking I think I should supplement the record
19 because my clerk called my attention to the fact
20 that while I gave the citation of the case that was
21 affirmed by the higher Court, I did not give the
22 name. It's Sekou, also known as Chris Reed et ano,
23 against Robert J. Henderson. It's 73-CV-543,
24 Northern District of New York, affirmed 495 F 2d
25 1367 (2d Circuit 1974). There is one other thing

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

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