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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES,
JOSE SALDANA and ROBERT ESCHERT, detainees
of the New York City House of Detention for
Men, individually and on behalf of all other
persons similarly situated,

Plaintiffs,

75 Civ. 3073

-against-

MEMORANDUM

BENJAMIN J. MALCOLM, Commissioner of Correction
of the City of New York; ARTHUR RUBIN, Warden,
New York City House of Detention for Men;
GERARD BROWN, Deputy Warden, New York City
House of Detention for Men; and ABRAHAM D.
BEAME, Mayor of the City of New York, individu-
ally and in their official capacities,

Defendants.

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APPEARANCES:

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Attorneys for Plaintiffs

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LASKER, D.J.

In this class action brought by pre-trial detainees at the New York City House of Detention for Men (HDM) plaintiffs move for a preliminary injunction restraining the defendants from incarcerating any detainee at HDM without affording him (a) an hour of outdoor exercise each week day; (b) a minimum of four 30 minute visits weekly, at least one of which shall be at night or on a weekend; (c) contact visits between detainees and their visitors; (d) the option to remain in his cell during "lock-out" periods; and (e) certain rights regarding disciplinary procedures and correspondence as set forth in the judgments of this court in Rhem v. Malcolm, (70 Civ. 3962) dated March 22, 1974 and April 23, 1975. In addition, plaintiffs request an order enjoining defendants from soliciting from any detainee at HDM a waiver of the rights accorded to him under the Rhem judgments.

Finally, the plaintiffs move for an order declaring the case to be a class action and permitting them to proceed without prepayment of fees or costs pursuant to 28 U.S.C. §1915.

I.

As reference to the court's earlier judgments suggests, this case arises in the wake of the earlier litigation in Rhem v. Malcolm, a class action on behalf of persons

housed in the Manhattan House of Detention, generally known as the Tombs. See 371 F.Supp. 594 (S.D.N.Y. 1974), aff'd in part and remanded in part, 507 F.2d 333 (2d Cir. 1974). In that suit the court found that conditions at the Tombs deprived the inmates of their constitutional rights. The Rhem judgment of March 22, 1974 contained specific provisions as to inmate discipline and correspondence, and in addition ordered the defendants (who in that case as in the present one included the Commissioner of Correction of the City of New York, the Mayor of the City of New York and the Warden and Deputy Wardens of the institutions in question) to submit a comprehensive and detailed plan for the establishment of a classification system, inauguration of contact visits, improvement of the visiting schedule, increased recreational opportunities and optional lock-in. These requirements were reimposed by the court's further judgment of July 11, 1974.* On appeal by the defendants, the Rhem judgments were affirmed insofar as based on findings of fact and conclusions of law as to conditions at the Tombs, and remanded for consideration of the remaining relief to be granted. 507 F.2d 333.

Following the decision of the Court of Appeals, the defendants closed the Tombs and transferred its inmates (the plaintiffs in the Rhem action) to HDM. The Rhem

plaintiffs then contended that under the judgments as affirmed they were entitled to the same benefits they would have enjoyed had they not been transferred from the Tombs. Accordingly, the court in Rhem visited HDM, took testimony to determine the matter, and rendered a written opinion. Rhem v. Malcolm, 389 F.Supp. 964 (S.D.N.Y. 1975). On April 23, 1975 the court entered an amended judgment providing that the plaintiffs in Rhem who had been transferred to HDM were constitutionally entitled to (1) one hour of outdoor exercise each week day; (2) four 30 minute visits weekly, including at least one at night or on a weekend; (3) contact visits; (4) the option of remaining in the cell during lock-out periods and (5) specified procedures governing discipline and correspondence.

The Rhem judgment of April 23, 1975 applied only to detainees at HDM who had been transferred there from the Tombs, and the City authorities have applied it only to those detainees, who now number only 15 or 20 of the 1500 detainees presently held at HDM.

II.

The instant litigation is brought on behalf of all present or future detainees at HDM, attacking the constitutionality of the conditions in which they are held in custody. The present motion seeks to extend forthwith to all HDM detainees the rights to which the Rhem court

held by its earlier judgments that former Tombs inmates transferred to HDM were entitled.

The defendants oppose the application for preliminary relief on various grounds but rest primarily on their contention that to grant the injunction would amount to an unjustifiable grant of final relief at the outset of the litigation. Ordinarily such an argument would carry great weight, but in view of the historical background this is not an ordinary case. The plaintiffs point out that the record in Rhem v. Malcolm, including the affirmance by the Court of Appeals, establishes an overwhelming likelihood of success on the merits in the present case, and that any delay in according plaintiffs their constitutional rights would be unjust. They argue that the need for immediate relief is underscored by the finding of the New York City Board of Correction in its report on HDM of June, 1975 that:

"... the situation is critical and deteriorating. It is, in our judgment, the most serious and potentially explosive prison atmosphere to exist in New York City in recent years. If potentially tragic problems are to be avoided, changes should be implemented before the expected summer upsurge in arrests and tensions multiply existing difficulties.

* * *

To defuse this tense and dangerous situation, a number of immediate and longer-range steps should be under-

taken. We are convinced that decisive action, taken now, can turn the situation around and break the mutually-reinforcing chain of events that is currently sweeping HDM toward a major crisis. Paramount among the actions the Board recommends are: ...

3. Federal court-mandated changes in visiting procedures, classification, and the provision of outdoor recreation should be implemented on schedule."

III.

Before reaching a determination of the issues disputed on the motion, we note that the defendants have represented to the court that they are presently complying or substantially complying with the requirements of the Rhem judgments as to visiting schedules, exercise privileges, and discipline. Accordingly, we put those issues aside.

* * * *

A party moving for a preliminary injunction must establish either a "combination of probable success and the possibility of irreparable injury or that [it has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in [its] favor." Pride v. Community School Board, 488 F.2d 321, 324 (2d Cir. 1973).

We agree with plaintiffs that by virtue of the Rhem record, which includes evidence as to conditions at HDM itself, the plaintiffs have established the over-

whelming probability that they will succeed on the merits as to the issues of contact visits and optional lock-in. Indeed, it is difficult to conceive what facts defendants can prove in this litigation as to these issues which they have not already placed on the record (or had the opportunity to establish) in Rhem.

Nor is there doubt that the plaintiffs have met the burden of establishing "the possibility of irreparable injury" as to contact visits and optional lock-in. The continuing daily deprivation of constitutional rights to minimal physical conditions of custody and the right to a contact visit with a family member or friend (Rhem v. Malcolm, supra, 507 F.2d at 339) is irreparable by definition.

Defendants argue in their memorandum of July 10, 1975 that no injunction relating to lock-in should be granted because to do so would require "definitive expenditures and changes prior to a full scale determination on this issue." As we have noted, such an argument would ordinarily carry great weight but this is, in view of its historical background, an extraordinary case. In Rhem, this court conducted evidentiary hearings as to lock-in conditions at HDM itself. The court heard the testimony of the Warden of HDM, who specified in detail the facts which the defendants claimed to support their position that the hours

of optional lock-in should not be expanded. Neither defendants' affidavit nor their memorandum in opposition to the current motion make any offer of further proof on the subject. In any event the decree to be granted on this motion will not in any way exceed the parameters of the judgments rendered in Rhem on the basis of the evidentiary hearings.

Moreover, the granting of an injunction at this time is not, as suggested in defendants' memorandum (p. 9), inconsistent with the order of June 26, 1975, denying the Rhem plaintiffs' request to reopen the proceedings in that case. We noted at that time that plaintiffs sought to raise "extensive questions of law and fact which should not be raised in a case ... [in] which a final judgment has been filed," and that because such questions might "relate to conditions at institutions other than HDM, they should be litigated in a plenary lawsuit..." The present case is indeed a new plenary lawsuit, but it involves only HDM, an institution whose conditions have already been extensively explored by the parties and the court. We are not required by any rule of law or common sense to shut our eyes to what is a matter of record and known to the court and all the parties.

We view differently the remaining issue, that is, the right of all HDM inmates to receive magazines and

books not originating with the publisher, as ordered in Rhem. As to that question, defendants properly point out that neither the Rhem record nor the record in this case includes evidence as to the adequacy or inadequacy of HDM's library facilities. They persuasively argue that they should not be preliminarily enjoined from invoking the rule that inmates may receive magazines and books only from the publishers directly, a rule which they claim contributes to the security of the institution, without plaintiffs' showing that HDM's library facilities are insufficient to remedy such a limitation.

Accordingly, the defendants are enjoined from incarcerating any detainee at the New York City House of Detention for Men without affording him (a) contact visits and (b) the option of remaining in his cell during lock-out periods in accordance with the judgment of April 23, 1975 in Rhem v. Malcolm.

The motion to declare the case a class action pursuant to Federal Rules of Civil Procedure 23(c)(1) and Rule 11A of the Civil Rules of this court, which is unopposed by the defendants, is granted. The allegations of the complaint clearly comply with the requirements of Rule 23, Federal Rules of Civil Procedure. Indeed, it has become the norm that cases challenging the constitutionality of the conditions of custody of prisoners are brought and allowed as class actions.

The motion to enjoin the defendants from soliciting waivers from members of the plaintiff class in Rhem is denied, both because the defendants represent that no such solicitations are being made and because the subject matter does not and would not appropriately fall in the purview of the complaint in this separate action.

The motion to permit plaintiffs to proceed without payment of fees or costs or security pursuant to 28 U.S.C. §1915 is granted.

Submit order on notice.

Dated: New York, New York
July 11, 1975.

MORRIS E. LASTER
U.S.D.J.