United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-2036

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MARTIN SOSTRE,

- Plaintiff-Appellant

v.

PETER PREISER, et al.,

- Defendant-Appellee

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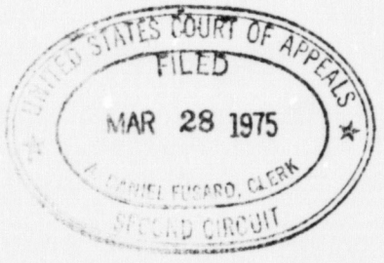
On Appeal from the United States District Court
from the Northern District of New York



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"I cannot submit to injustices, even minor ones. Once one starts submitting to injustices and rationalizing them away, their accumulation soon creates a major oppression. That is how entire peoples fell into slavery."

Martin Sostre

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STATEMENT OF THE CASE

This case is here on an expedited appeal from denial of a Preliminary Injunction in the District Court (N.D.N.Y.), Hon. Edmund Port, D.J., after a hearing in early March, 1975. The original action was brought under the Civil Rights Act (42 U.S.C. Section 1983) by Appellant as plaintiff pro se in May, 1973, a few days after he alleged he was beaten in the Segregation Unit at Clinton Prison, by a squad of seven or more guards, when he refused to bend over and spread his buttocks to exhibit his anus to them in the course of a "strip search."

In his Complaint, Appellant sought declaratory and injunctive relief, and money damages, from the Commissioner of Corrections and the Wardens of Auburn and Clinton Prisons, and recited seventeen separate causes of action, including wrongful punishment and indefinite confinement to segregation,

wrongful application of the no-beard rule, wrongful imposition of the rectal search, wrongful denial of visits from attorneys, clergy and friends, interference with mail, and wrongful punitive transfer from Auburn to Clinton.

Shortly after the complaint was forwarded from the Segregation Unit at Clinton to the Court and the defendants, MARTIN SOSTRE was indicted in Clinton County on three counts of assault in the second degree, for alleged injury to three of the seven guards who had carried out the anus examination phase of the "strip search" by force at Clinton on May 19, 1973.

On September 14, 1973 Judge Port entered an Order finding the complaint sufficient in law, and permitting the plaintiff to proceed in forma pauperis. The case lay dormant in the Northern District for some sixteen months, until SOSTRE was able to obtain counsel. Then, as the assault trial got under way in Plattsburgh, a pre-trial conference took place in Judge Port's chambers at Auburn, New York on February 7, 1975. The Court agreed to hear Plaintiff's motion for preliminary relief at Auburn as soon as the trial would end in Plattsburgh. Judge Port entered an Order directing that the Plaintiff be brought into Federal custody upon the conclusion of the assault case, so he would not again have to face the forcible search and re-confinement to the Segregation Unit, upon returning to

Clinton, before the issues on the Motion for Preliminary Injunction would be resolved. At the end of the trial in Plattsburgh, the Plaintiff was brought to the Jefferson County Jail at Watertown, New York, pending the hearing on his motion at Auburn.

The hearing took place on March 4th and 5th. Despite extensive and uncontradicted testimony by the Plaintiff regarding arbitrary enforcement of the no-beard rule and the forcible rectal search rule against him, and despite the patent insufficiency of the rationales offered for such treatment by the prison, the Court Denied relief. He then ordered Plaintiff returned to the custody of the Warden of Clinton Prison, but, with the agreement of Defendants, stayed the Order for several days to permit recourse to this Court. On March 11, 1975, after reviewing papers and hearing a short oral argument, this Court extended the stay, under Rule 8, F.R.A.P., keeping SOSTRE at Watertown pending disposition of this appeal.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in refusing to preliminarily enjoin enforcement of the no-beard rule as applied to Appellant.

2. Whether the District Court erred in refusing to preliminarily enjoin, as disproportionate punishment, the continued, indefinite confinement of Appellant in punitive segregation for his refusal to comply with the no-beard rule.

3. Whether, given the showing below of the threat of harm to Appellant, and the arbitrary enforcement of the rectal search rule against him in the segregation unit, the District Court abused its discretion in refusing to preliminarily enjoin continued general enforcement of this rule.

THE FACTS

MARTIN SOSTRE is a 52-year old black man born in New York City of Haitian and Puerto Rican Indian descent. He was convicted in 1968 of the sale and possession of narcotics, assault and contempt of court; and received a total sentence of 30-41 years and 30 days.[1] At the time of his arrest Plaintiff was wearing the same connected moustache and beard which is the subject of this law suit. (T. 22.)

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[1] SOSTRE, who had opened a book store in Buffalo's black community in 1965 while working at Bethlehem Steel, maintained from the time of his arrest that he was set-up and framed for his political activity in the black community, particularly during the time of urban unrest in the summer of 1967. After his retained counsel dropped the case, he refused court-appointed lawyers and was forced to trial without counsel. He refused to participate in what he termed a "legal lynching" and was convicted by an all-white jury during a time when racial feelings in Buffalo ran high. In 1971 ARTO WILLIAMS, the man who testified that SOSTRE sold him heroin, admitted in an affidavit that he had cooperated with the Buffalo police to set SOSTRE up, and that SOSTRE never sold him any drugs. Reluctant to testify under oath without immunity from perjury prosecution, WILLIAMS finally returned to Buffalo two years later and recanted under oath in the Western District (CURTIN, J.) After nearly a year's wait Judge CURTIN denied SOSTRE's petition, finding that WILLIAMS' testimony was "unworthy of belief." That decision has been appealed to this Court where, after argument in early December, 1974, it awaits disposition.

Upon his conviction, SOSTRE was sent to Greenhaven Prison, where he retained the faint outline of his beard and moustache, although it was much thinner and not as visible. (T. 26.) In September, 1969, a federal court ordered him removed from solitary confinement at Greenhaven, where he had been for over a year,[2] and he was transferred to Wallkill Prison.

SOSTRE stayed in general population at Wallkill for three years, during which time his beard grew to its present length. (See photo) He was never told to shave at Wallkill (T. 28.), nor was he threatened with any disciplinary action for wearing it. (T. 30.) In August, 1972, he was transferred to population at Auburn Prison, where, until October of 1972, nothing was said to him about his beard. (T. 31.) In October, a work strike occurred in the Auburn license plate shop. Although SOSTRE did not work in the shop, he had been ac-

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[2] Judge Constance Baker Motley, in the landmark case Sostre v. Rockefeller, 312 U.S. 863 (S.D.N.Y. 1970) found that the indefinite solitary confinement of SOSTRE was punishment disproportionate to the minor offenses allegedly committed; that conditions in segregation, including the use of the rectal search, were "dehumanizing in the sense that they are needlessly degrading," that the disciplinary procedures were constitutionally deficient, that illegal mail censorship was taking place, and that SOSTRE was punished in segregation "because of his threat to file a law suit against the Warden to secure his right to unrestricted correspondence with his attorney and to aid his codefendant and because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison." Id. at . Much of Judge Motley's opinion was reversed or limited on appeal (Sostre v. McGinnis, 442 F2d 178 (2d Cir. 1971)

tive in trying to form a labor union at Auburn (as he had at Wallkill), and he was accused of being an organizer of the strike. At that point he was called before a disciplinary board on the complaint of an officer that he had refused to sit in a designated place in the mess hall (where SOSTRE said the table was covered with spilled coffee. [T.33.]). The officers told him he was known to be one of the organizers of the strike, and gave him an ultimatum to shave off his beard (T. 33.).

On or about November 11, 1972 SOSTRE was brought before a Superintendent's Proceeding at Auburn and again told to shave. He refused, stating his reasons:

> I listed evidence consisting of a photograph that the police department had taken at the time I was arrested, told them that this was in fact my identification, and if they asked me to shave it would be to alter my identification. I presented that proof which was the photograph in the Ebony magazine to show I had a quarter of an inch beard at the time I was arrested, and I further pointed out that a quarter of an inch beard was so short there certainly couldn't be any problems of hygiene as far as nits and lice, and a beard is a beard, so sparse a beard, and that this was the fact that none of these problems jeopardized the security of the prison and they had no right to force me to shave my one-quarter inch beard. (T. 37.)

He was sent to Segregation, where a few days later he was called back before the same committee, which now

told him he was a troublemaker, that they had a place for prisoners like him; and that he would be transferred to such a place. (T. 38) On December 19, 1972, he was transferred to Clinton, the most remote and inaccessible -- and the harshest -- of New York state prisons. Upon his arrival he was placed directly in the Segregation Unit, Unit 14, known as "The Box." This was said to be because of his history as a 'chronic behavior problem,' and to 'determine his ability to adjust to the rules of the institution.' He has never left the Box.[3] Every seven days he goes before the "Adjustment Committee"[4] and is told to shave. When he refuses he is given another seven-day sentence and then recalled again. This 'charade' has continued since December, 1972.

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[3] Plaintiff was out of Unit 14 on a Federal writ to testify at a trial in the Western District of New York from May 19, 1973 to June 5, 1973, from December 18, 1973 until September 4, 1974 to testify in the Southern District, and from January 24, 1975 until the present time (pursuant now to stay Order of this Court) to testify in the Northern District.

[4] The weekly recall to the Adjustment Committee, called a "charade" (T.) and a "merry-go-round" (Opinion, p. 8) by the Court, was varied more than once by the more serious disciplinary action of a "Superintendent's Proceeding," under which Appellant was variously sentenced to the Box for as much as 60 days at a time, and also at least once deprived of some "good time." See Plaintiff's Exhibit 9. Captain Tersini insisted that the Adjustment Committee was "not a disciplinary body," (T. 203), but the Court found otherwise. (T. 222, Opinion, p. 6).

THE COURT: "You appear before the board and it's fore-ordained?"

THE WITNESS: "Yes."

THE COURT: "It's a little performance you and they go through weekly, would you say that?"

A: "Right. They say seven days, and here we go again. * * * "
(T. 41)

SOSTRE has been confined to Unit 14 continously and faces the prospect, unless he shaves, of doing the remainder of his thirty years in punitive segregation.

In the Box, on the same principle of conscience, he has refused to submit to examination of his anus, in which, while stripped naked, he must bend over and manually spread his buttocks so that his outer rectum area may be viewed by the Unit 14 guards, who require a "thorough strip frisk" any time he leaves or enters the unit. As a result of his refusal, SOSTRE has been denied legal, clerical and personal visits at Clinton for the past 27 months. On May 19, 1973 he was taken from his cell to an area known as the "shakedown table," where, surrounded by a squad of seven guards, he was ordered to "strip" and "frisk." He took off all his clothes and had the insides of his mouth and ears examined, raised first his arms and then his genitals, then turned around and showed the bottoms of his feet. When the lieutenant in charge said, "Spread 'em," Appellant refused. The seven officers then set upon

him, threw him to the concrete floor, struck and kicked him several times, and pried his legs apart for their examination. (T. 52-54)

Appellant's uncontradicted evidence is that since May, 1973, he has been assaulted and beaten at Clinton on eleven separate occasions while being forced to submit to rectal examination. In one instance, he was beaten while being forcibly searched prior to being taken for X-ray of a toe injured in a prior forced rectal search. (T. 57-59) The strip search, replete with anus examination, is required each time Appellant leaves or returns to Unit 14, despite the fact that possessions in his cell are limited to law books, prison-issued tooth brush, tooth paste, and clothing; and that his cell is always monitored and frequently searched. Furthermore, any time he leaves the Unit he is handcuffed and shackled to a restraining belt around his waist. "You can't even get a handkerchief out of your back pocket." (T. 64) While Plaintiff has been assaulted eleven times in the course of the forced rectal search, there have been occasions when the search was conducted forcibly, but without any beating, and still other instances when the rectal search was not required at all. (T. 80-82)

SOSTRE testified further that he is locked in his cell twenty-four hours a day, denied access to the regular Unit 14 recreation area (T. 88) and permitted

exercise only in a cell smaller than his own with an open roof (which he declined). (T. 88-92) He is allowed no face to face contact with fellow prisoners, denied all group activities, vocational, educational, and religious, and may not use the law library. (T. 93) His cell is stripped of furniture and personal possessions, he can not see out of a window or view his reflection in a mirror. (T. 94) Unlike others in Segregation, he may not buy anything in the commissary or listen to the radio.

* * * * *

Dr. STEVEN TEICH, a psychiatrist who was Director of Mental Health at the Manhattan House of Detention for Men, testified about the harmful effects of prolonged solitary confinement. He said long-term isolation and separation from external stimuli and environment "leads one into internal fantasy, internal experience, and frequently into a state of mental dishealth or unhealth," and that the length and nature of Appellant's confinement "would encourage a disintegration of personality and a development of a movement toward a psychotic process." (T. 115) Further, Dr. TEICH testified that, based on his experiences working in the Manhattan House of Detention, long-term confinement has a profoundly negative effect on an individual:

> There are individuals who have been able to absorb that experience and use it to strengthen themselves, but those are rare individuals, and even with those individuals there is a quid pro quo, if you will. There is something they sacrifice in order to develop strength elsewhere, so there is always something that results in the diminution of the individual as a result of this isolation.
>
> (T. 131)

The Doctor also explained how punishment which is clearly excessive, and disproportionate to the alleged offense, leads directly to paranoia as the mind struggles to rationalize unjustified suffering. (T. 138)[5]

Mr. MARION D. STRICKLAND, Superintendent of Utility Services for the Department of Corrections of the District of Columbia, at Washington, D.C., testified that he is responsible for implementation and coordination of security and "treatment areas" of three District of Columbia prisons, supervising approximately 1,500 prisoners. (T. 141) Mr. STRICKLAND testified that prisoners under his supervision are permitted to wear beards, moustaches and Afro-style hair, and that over fifty per cent wear some form of facial hair. (T. 142)

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[5] When asked, as a Doctor of Medicine who had worked in a jail housing over a thousand men who were allowed to wear beards and moustaches, whether Mr. SOSTRE's beard would presnet any hygienic problem, Dr. TEICH said, "No, I certainly doubt that." (T. 139)

He said no hygienic, identification or security problems have been encountered. He said allowing men to wear beards and moustaches helps them maintain their individual identities, and furthers their rehabilitation. (T. 148) Mr. STRICKLAND testified further that he could see no reason whatsoever for prohibiting SOSTRE from wearing his beard, (T. 148) and that, even assuming prohibition of all beards could be a proper prison rule, "This is beyond my comprehension, that a person would be placed in solitary confinement for an excessive period of time for wearing a beard. I just simply do not find that that action would be recommended or condoned ...." (T. 158)

Mr. STRICKLAND also testified that when a prisoner under his supervision in the District of Columbia is confined to segregation and has a legal visit, he is allowed to go without handcuffs, and is not searched prior to the visit. A "pat" search is done afterwards. (T. 166) When a prisoner goes to court he is strip searched, but rectal inspection is left to the discretion of the officer in charge. (T. 174 ff.) Mr. STRICKLAND agreed that a search for the purpose of punishment would never be proper. (T. 176)

The final witness at the hearing was Captain MICHAEL TERSINI, called by the Plaintiff under Rule 43, F.R.C.P. Captain TERSINI, Assistant to the Deputy Superintendent of Security at Clinton, testified at length about the procedural framework of the disciplinary bodies operating

at Clinton Prison. (T. 197-243) TERSINI testified that, pursuant to Administrative Bulletin #118 (7 N.Y.C.R.R., Chapter 9, Part 1020) a "thorough strip search," including a rectal examination, is required of every prisoner assigned to Unit 14 any time he leaves or enters the Unit. He said this rule was partially changed in December of 1974 to suspend the use of such search for medical and staff interviews inside the prison. (See Plaintiff's Exhibit #8). Captain TERSINI said constant rectal searches are required of Unit 14 prisoners because they are "normally ... not prone to abiding by the rules." (T. 270)

Captain TERSINI said the no-beard rule at Clinton was made by Warden LaVALLEE, one of the Defendants, and that it was not promulgated in any formal statute, code or rule. (T. 260) He said the purpose of prohibiting beards is to prevent covering of the chin structure or cheek bones, and thus hindering identification; and for reasons of hygiene (T. 263)

A summary of Appellant's disciplinary violations (Plaintiff's Exhibit #9) was introduced, which showed, that the charges which keep Appellant under these formidable sanctions from week to week almost always involve his "failure to properly shave." (T. 305-6) Two mug shots of Mr. SOSTRE, one dated December 18,

1973 (Exhibit #10) and the other dated March 18, 1968 (Exhibit #11) were produced by Defendants from their Clinton Prison identification file on SOSTRE, and admitted into evidence. One photograph, #11, shows Plaintiff without a beard, the other with. Captain TERSINI insisted that Plaintiff's beard changes a "focal point" of his identification when compared to his picture without a beard in Exhibit #11. He did concede (unlike the Court) that SOSTRE's beard presents no hygiene problem. (T. 289-290)

* * * * * *

At the conclusion of the hearing, the Court stated his feeling that the issue of Plaintiff's right to wear a beard in prison was not of Constitutional magnitude. Basing his ruling on his own decision in an earlier case where he dismissed a complaint against a beard that Plainthff had failed to show the requisite likelihood of success in a trial on the merits.

The Judge also noted there was evidence regarding the fact that a beard might present a problem of hygiene or mis-identification (Opinion, p. 14.)

Observing that "judges are not equipped by training or in any other way to appraise jails or prisons," Judge PORT rejected the claim that indefinite confinement to the Box was disproportionate to the infraction and thus impermissible. He then decided that the weekly trips on

the Adjustment Committee's "merry-go-round" constituted separate punishments for separate successive offenses which were not excessive despite their cumulation (Opinion, p. 16.)

On the claim regarding the rectal search, the Court found that Plaintiff had failed to show probable success on the merits and irreparable injury, and denied the Motion for Preliminary Injunction (Opinion, p. 19.)

A R G U M E N T

I. THE BLANKET RULE PROHIBITING ALL BEARDS AT CLINTON PRISON IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT SOSTRE AND SHOULD HAVE BEEN ENJOINED BY THE DISTRICT COURT.

A. A Prisoner Retains His Constitutional Rights After Incarceration And These Rights Can Only Be Limited By Legitimate Countervailing Interests And Goals Of The Prison.

In a series of recent prisoners' rights cases the United States Supreme Court has firmly established that a citizen's Constitutional rights continue after imprisonment, and that limitations on fundamental rights must be supported by the legitimate "needs and exigences of the institutional environment." Wolff v. McDonald, 418 U.S. 539, 94 S.Ct. (1974);[6] see also Pell v. Procunier, 418 U.S. ___, 94 S.Ct. 2800 (1974);[7] Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319,

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6 "There is no iron curtain between the Constitution and the prisoners of this Country." 418 U.S. at 555 and 556

7 "We start with the familiar proposition that '(l)awful incarceration brings about the necessary withdrawal or

321 (1972.) Thus when a prison regulation is challenged as wrongfully limiting a right protected by the Constitution, the Court must carefully analyze and determine the legitimacy of the rule. Assuming it is based on a real need of the prison, the Court must further determine whether the scope of the rule could be limited, or whether there are alternative ways to accomplish the purpose.[8]

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limitations of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed.2d 1356 (1946.) See also Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972.) In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correction system. Thus challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." - 416 U.S. at , 94 S.Ct. at 2804.

8 "Even though the governmental purpose be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960.) See also Procunier v. Martinez, 416 U.S. at 413; Note: "Less Drastic Means and the First Amendment," 78 Yale L.J. 464 (1969.)

B. The Right To Wear A Beard Is Protected By The United States Constitution.

This Court in its recent opinion in Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973), held a police department hair-length regulation unconstitutional:

> While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial Constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring some restriction on the individual. The First, Third, Fourth, Seventh, and Eighth Circuits have held that the Constitution limits the State's right to regulate the personal appearance of its citizens. We agree. See Olff v. East Side Union High School District, 404 U.S. 1042, 92 S. Ct. 703, 30 L. Ed. 2d 736. (DOUGLAS, J. dissenting from denial of certiorari.)
>
> We hold only that a choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate State interest reasonably related to the regulation.
>
> -Ibid at 1130.

(See also Romano v. Kirwan, ____ F. Supp. ____, Civ. 1973-629, a three-judge court decision in the Western District of New York in March, 1975, holding unconstitutional a New York State Police hair-length rule. District Judge John T. CURTIN, writing for the majority, said: "Uniformity

for uniformity's sake does not establish a public need.")

In the Dwen case, the State argued that since the regulation applied to the police it did not infringe upon a Constitutional right. Rejecting this, this Court cited with approval Seale v. Manson, 326 F. Supp. 1375 (D. Conn., 1971), a case in which a jail detainee was allowed to keep his beard; and two other cases involving hair questions in the military. The Court said: "While these cases and many of those in the other Circuits have not concerned uniform police and fire departments, the basic issue remains the same -- the right of the State to impose standards of hair styling. The different status of the individual raising the claim bears on the question of whether the right is outweighed by a legitimate State interest." (Emphasis added) Dwen v. Barry, supra, at 1130 Thus, this Circuit, consistent with recent Supreme Court decisions, has established that governmental interference with a person's hair preference, regardless of the person's status (police, military, prisoner), must be based upon a reasonable and functional state interest which outweighs the individual's constitutional right.

C. The District Court Erred In Holding That A Prisoner's Right To Wear A Beard Did Not Raise A Constitutional Question.

Although the District Court's basis for denying Plain-

tiff preliminary relief on the beard issue is not clear, it appears that his main rationale was the belief that the beard question was not of a magnitude requiring Federal intervention. In reaching this determination, the Court below relied on its own opinion in Sekou v. Henderson, 73 Civ. 543 (N.D.N.Y., 1973), aff'd, without opinion, 495 F. 2d 1367 (2d Cir., 1974). In Sekou, Judge PORT dismissed a pro se complaint challenging a rule prohibiting beards at Auburn Prison, and this Court affirmed the dismissal without opinion. The cursory dismissal of a pro se complaint, affirmed without an opinion in this Court, is not rightful precedent for dismissing without consideration a "substantial Constitutional issue." Dwen v. Barry, supra, at 1130. This Court, in affirming the dismissal below in Sekou without opinion, did not have the benefit of well-argued briefs on appeal, nor a record made below as to the scope of the beard rule and the actual beard in question, the punitive consequences of the violation, the rationale for a blanket prohibition in the face of relaxing standards as to the wearing of beards, and the possibility of abuse in the arbitrary enforcement of such a rule.

More importantly, the dismissal of the complaint in Sekou was in direct contradiction to recent decisions of the U.S. Supreme Court concerning the First Amendment in prisons. A constitutional right on the street remains a constitutional right in the prison unless a legitimate need for curtailing that right exists. This balancing test was

explicitly adopted in this Circuit on the very question of hair length in Dwen v. Barry, supra. In Sekou, the complaint was dismissed without any analysis of the legitimacy or any balancing of the need for the rule against the constitutional right.

Finally, the District Court's resort to a supposed rule of judicial non-intervention, in Sekou and in the instant case, is not in accord with recent Supreme Court decisions, nor the strong line of Federal decisions throughout the country. "A policy of judicial restraint cannot encompass our failure to take cognizence of valid Constitutional claims whether arising in Federal or State institutions." Procunier v. Martinez,94 S. Ct. 1800. 1807 (1974).[4]

D. The Implied Alternative Holding By The District Court That Appellant's One-Quarter Inch Beard Presented Hygiene And Security Problems Was Also Erroneous.

While the District Court's main rationale for refusing to question the no-beard rule at Clinton Prison was a mis-appraisal of the First Amendment, and misguided judicial

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4 The District Court throughout the hearing and in its Opinion expressed a strong judicial philosophy of non-intervention on matters concerning practices within prisons. The Federal courts have more recently become deeply involved with prison practices when constitutional rights of prisoners are involved. See, e.g., Rhem v. Malcolm, ___ F. 2d ___ (no. 74-2072 2d Cir. 11/8/74, Slip Op. at 389-391), affirming 371 F. Supp. 549 (S.D.N.Y., 1973)

restraint, the court also somewhat off-handedly offered reasons of hygiene and security in an attempt to shore up this ruling.

The Court first found, based on the testimony of Capt. TERSINI, that the chin structure is a "critical point" in identification of an individual. This testimony apparently was accepted by the Court to mean that SOSTRE's beard so significantly changed his appearance that he would present an escape risk to the institution. The absurdity of such an idea would be humorous if it had not been accepted by a federal judge, and justified as a basis to keep someone locked up indefinitely in punitive segregation.

Moreover, the record below shows that Clinton Prison has two photographs of SOSTRE, with and without the beard, and both pictures are available to check his identification. His beard in no way alters or hides his "chin structure;" but rather highlights it. Any rational, impartial person can see that this beard could not conceivably cause any problem in the identification of the Appellant.[6]

The District Judge cited hygiene as the other basis for the blanket rule against beards. Ironically, on the day

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6 Superintendent MARION STRICKLAND, incharge of security in three penetentiaries in the District of Columbia, testified that prisoners there are allowed to wear beards and moustaches, and there are no problems concerning security, identification or hygiene. He further testified that he had been in correctional work for thirteen years, and could not see any legitimate prison interest to prohibit Appellant from wearing his beard

the Court handed down its decision, the schools in Auburn were closed because of a suspected lice problem. The District Court seized upon this situation, completely outside the record to bolster its position that lice could be a problem in a closed society like a prison. Capt. TERSINI was asked directly whether Mr. SOSTRE's beard presented any hygiene problem to the institution, and he replied that it did not. (T. 290) Dr. TEICH agreed. (T. 139) See also Seale v. Manson, supra. A glance at the mug shot (Plaintiff's Exhibit 10) shows that Appellant has far less hair than the great majority of men in or out of prison.

The District Court was clearly wrong in accepting hygiene or identification as a basis for a hands-off policy on questions concerning prison practices. There was in fact no showing in the hearing below of any legitimate purpose served by the blanket rule against all beards.

E. Even Assuming The Prison Has Legitimate Interests Concerning The Question Of Prisoners' Right To Wear Beards, Such Interest Could Be Served By Alternative Less Drastic Measures.

> The limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular government interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.
>
> Procunier v. Martinez, supra, at 413.

See also United States v. O'Brien, 391 U.S. 367, 377 (1965);

Butler v. Preiser, 380 F. Supp. 612 (S.D.N.Y., 1974), Note Less Drastic Means And the First Amendment, 78 Yale 65 464 (1964)

Here, the rule at Clinton, prohibiting all facial hair below the corners of the mouth, prohibits with such a broad sweep as to go far beyond any legitimate prison interests. "It has become axiomatic that precision of regulations must be the touchstone in the areas so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963) See also Aptheker v. Secretary of State, 378 U.S. 479, 488 (1968).

The overbreadth of the no-beard rule at Clinton can be seen when compared to the Model Rule concerning appearance and dress style drafted by the Center for Criminal Justice at Boston University.[7] In addition the Defendant Commissioner of Corrections has instituted a beard and hair rule for county jails and penetentiaries which takes into account prevailing community styles and standards, and allows for beards providing they do not present real problems of hygiene or security.[8]

It is obvious that there are alternative ways to deal with hygiene and identification if there are shown to be

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7. Krantz, Model Rules and Regulations on Prisoners Rights Responsibilities, Rule 1A-6 (See Appendix)

8. Title 7N.Y.C.R.R. &5100.6(c) (See Appendix)
See also National Advisory Commission on Criminal Justice Standards and Goals, Chapter 2 Rights of Offenders, Standard 2.15

real problems. Rules can require that beards be kept clean, trimmed, and not unreasonably long. Duplicate photographs of prisoners can be kept on file with and without beards, so that both identifications are available. See Teterud v. Gilman,[9] 385 F. Supp 153, 160 (S.D. Iowa, 1974).

The beard which Appellant had when he went to jail is part of his personal and cultural identity, as well as his "identification." The prison seeks to make him change his identity by forcing him to shave. The right of self-expression and self-identity through the simple act of choosing how you look is just as valuable to a prisoner as it is to a free person.

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of ideas; his yearning for self-respect does not end; nor his quest for self-realization concluded, If anything, the need for identity and self-respect are more compelling in the dehumanizing prison environment.
>
> It is the role of the First Amendment and this Court to protect those

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9. In upholding the right of a Native American prisoner to wear his hair long, the Court dismissed the rationale of security-identification, stating:

> First, the record discloses that all inmates of the Iowa State Penitentiary are photographed shortly after their arrival at the institution. According to Warden Brewer, these photographs are taken for ID purposes. If an inmate grows his hair long he can easily be identified by having a second picture taken.
>
> Teterud v. Gillman, supra, at 160.

> precious personal rights by which we satisfy such basic yearnings of human spirit.
>
> Procunier v. Martinez, 44 S. Ct at 1818 10 (BRENNAN, J. concurring).

The lower Court failed to analyze and weigh the reasons for the no-beard rule against the "substantial constitutional right" of the Appellant. Judge PORT didn't believe that SOSTRE had a constitutional right to begin with, so it is not surprising that the reasons for the rule were perfunctorily accepted.

The Constitution as interpreted in the cases discussed requires the federal courts to restrain the arbitrary proscription of beards as applied to the Appellant, and enforced at Clinton and elsewhere, and the District Court's rejection of the claim for relief from this rule was a clear abuse of his discretion which ought to be reversed by this court.

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10. For an anecdote concerning needless, dehumanizing prison grooming rules justified under the rubric of security and identification, see the story of the rule against blue underwear, The Official Report of the New York State Special Commission on Attica, p. 46.

II. THE INDEFINITE CONFINEMENT OF PLAINTIFF IN PUNITIVE SEGREGATION FOR REFUSING TO SHAVE CONSTITUTES PUNISHMENT GREATLY DISPROPORTIONATE TO THE ALLEGED RULE INFRACTION, IN VIOLATION OF THE EIGHTH AMENDMENT, AND THE DISTRICT COURT ERRED IN NOT GRANTING PLAINTIFF PRELIMINARY RELIEF.

A. Federal Courts Have Held That Punishment For Prison Rule Infractions Must Not Be Disproportionate To The Seriousness Of The Alleged Offense.

The United States Court of Appeals for the Seventh Circuit has clearly established the proposition that punishment for prison rule infractions must not be disproportionate to the seriousness of the offense.

> We recognize the general proposition that punishment which is disproportionate to the offense committed constitutes cruel and unusual punishment whether imposed without or within prison walls. Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), Wright v. McMann, 321 F.Supp. 127 (N.D.N.Y. 1970), Fulwood v. Clemmer, 206 F.Supp. 370 (D.D.C. 1962.)"
>
> - Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) at 636.

The Court went on to say that disproportionality

> is partly a question of fact and wholly one of degree. An inmate who refuses to shave his beard does not ordinarily deserve solitary confinement; conversely the mastermind of a large scale escape attempt or a devastating riot may justly receive more than a few days in isolation from his fellow inmates.
>
> - Id. at 636 (emphasis added)[11]

The Court said segregation should be reserved "to correct serious infractions of the rules." Id. at p. 628. See also Fulwood v. Clemmer, 206 F.Supp. 370 (D.D.C. 1962), in which the Court ordered the plaintiff released from solitary confinement, holding the length of confinement and the punishment was disproportionate to the offense involved.

On remand, the District Court in Adams carefully analyzed the conditions of confinement of the plaintiffs, who had been in segregation for sixteen months, and the nature of the rule infractions with which they were charged:

> All of these plaintiffs were found to have committed violations regarding the July, 1972 work stoppage, either

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[11] "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the crime of having a common cold." Robinson v. California, 370 U.S. 660, 667 (1962)

> agitating or refusing to work. Some of the plaintiffs have been found to have committed several other infractions of prison rules during their confinement in segregation. The Court feels that the other offenses which these plaintiffs were found to have committed were all of a relatively minor nature. Additionally very few of them are of a recent nature, as the preponderance of them occurred during the months of July and August, 1972. From its review of the records and memorandum of the new hearings, the Court concludes that incidents of sufficient gravity have not occurred to justify the confinement as restrictive as that imposed upon the plaintiffs by placing them in H and I Units (segregation) for 16 months. This Court feels that punishing the plaintiffs by placing them in confinement under the very restrictive conditions imposed in H and I Units for a period of sixteen months constitutes punishment disproportionate to the various offenses with which the plaintiffs are charged and consequently is violative of the Eighth Amendment's prohibition against Cruel and Unusual Punishment.
>
> - Adams v. Carlson, 368 F.Supp. 1050, 1053 (E.D. ILL. 1973.)

Thus the Court in Adams held that confinement in a segregation unit for sixteen months for, at the very least, active participation in a work stoppage, was punishment disproportionate to the offense.

The Eighth Amendment test of analyzing the appropriateness of the punishment by taking into consideration the seriousness of the prison rule infraction was established three years prior to Adams by Judge JAMES T.

FOLEY in his landmark opinion in Wright v. McMann, 321 F.Supp. 127 (N.D.N.Y. 1970.) In Wright the plaintiff was placed in indefinite long-term segregation at Clinton Prison for refusing to sign a paper indicating he had read certain safety rules prior to commencing work. In holding such confinement violative of the Eighth Amendment, Judge FOLEY said:

> No longer can prisons and their inmates be considered society with every internal disciplinary judgment to be blissfully regarded as immune from the lime-light that all public agencies are ordinarily subject to . . .
>
> Security, of course, has been and should be of paramount interest in maximum security prisons. It is a primary consideration I keep in mind throughout the decision I make in these actions . . .
>
> However, there are risks in every phase of human life and this state interest can never justify treatment and procedure in prison confinement proven violative of human decency and Constitutional right.
>
> - 321 F.Supp. at 137.

After considering the nature of the confinement and the seriousness of the infraction, Judge FOLEY found that the "original confinement to segregation of MOSHER (plaintiff) and its prolongation was grossly disproportionate for the offense committed by him." 321 F.Supp. at 145.

In Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), this Court was faced with a question of disproportionate punishment occasioned by a year-long confinement of this

Appellant in segregation at Greenhaven Prison, in 1969, for three alleged rule infractions.[12] The Court, while accepting the legal concept of disproportionate punishment in a prison situation, found the punishment received by SOSTRE was not excessive (Judges FEINBERG and SMITH dissenting.) But the Court left the door open for consideration of other circumstances where punishment could be disproportionate to an offense.[13] The continuing punishment inflicted on the Appellant here is just such a case.[14]

In addition, the precedential effect of Sostre v. McGinnis must now be judged in its historical context. This Court's opinion in Sostre was the first Circuit Court case which dealt with major areas of prisoners' rights (disciplinary due process, rights of political expression, mail rights.) While it was a landmark case in its time, many of its holdings have now been expanded. Wolff v. McDonald, supra, has extended the requirements

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12 SOSTRE was allegedly confined to segregation for refusing to answer questions about the Republic of New Africa, attempting to mail a legal motion to his co-defindant via his attorney, and writing to his sister that he would soon be freed.

13 "We stress the seriousness of the multiple offenses charged against SOSTRE by Warden FOLLETTE, see pp. 183-85, supra, and express no view as to the Constitutionality of such segregated confinement as SOSTRE experienced if it were imposed for lesser offenses. Specifically, we express no view as to the Constitutionality of such segregated confinement if it had been imposed on account of one or any combination of the offenses charged against SOSTRE other than all of them." Sostre v. McGinnis, supra, at 194, f. 28.

14 See National Advisory Commission, supra, (fn. cont.)

of disciplinary due process, and has prohibited prison officials from reading legal mail; Procunier v. Martinez, supra, has expanded other mail rights. The Seventh Circuit in Adams v. Carlson, (supra) has more favorably and concretely applied the concept of disproportionate punishment. Since this Court in McGinnis faced the question of federal judicial intervention in prison administration, there have been numerous cases in which courts have become deeply involved in state prison practices where constitutional rights were at stake. (See, e.g., Procunier v. Martinez, supra; Rhem v. Malcolm, supra)

Also since McGinnis, the tragedy of Attica took place, and the bankruptcy and failure of the New York state prison system was exposed to this Court and to the world.[15] As Chief Judge KAUFMAN (author of the ma-

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[14] (cont.) Standard 211 Rules of Conduct, "Each correctional agency should immediately promulgate rules of conduct for offenders under its jurisdiction such rules should: * * * 4) be accompanied by a statement of the range of sanctions that should be proportionate to the gravity of the rule and the severity of the violation."

[15] See Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1972) See also U.S.A. ex rel. Larkins v. Oswald (2d Cir. 1975, No. 74 1885) in which this Circuit recently stated:

> The variety of possible charges, the erroneously long confinement, are all part and parcel of an internal disciplinary system which doubtless contributed to the Attica riot in the first instance (See Attica: The Official Report of the New York State Special Commission on Attica, Bantam Ed. 1972, pp. 74-79), which have resulted in other litigation, but which in any event are now outmoded, and for the future at least, wholly unconstitutional under Wolff v. McDonald." Id. at 1436

jority opinion in Sostre v. McGinnis) recently said:

> It is clear beyond cavil that American prisons have failed dismally to fulfill the ambition of contemporary penologists that prisoners should be treated and rehabilitated. Although it is impossible to deny that many are sentenced to prison as punishment, however, we cannot condone the idea that the mere fact of incarceration permits a prisoner to be punished at the whim of those charged with his confinement.
>
> U.S.A. ex rel Haymes v. Montanye, (2d Cir. 1974, no. 74-1208, Slip Op. at 22)[16]

Thus, Sostre v. McGinnis was an initial step in recognizing the constitutional rights of prisoners, and the Supreme Court has since spoken very clearly about the duty of federal courts to protect these rights. Now is the time to fix the constitutional limits on punishment within the prison, and it is hard to imagine a fact situation in which forceful application of clearcut restrictions on administrative

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16 In a footnote further on, Judge KAUFMAN said, "After all these years of reviewing prison problems we are not too myopic to notice the distinct possibility of arbitrary, misguided or disingenious invocation of administrative justifications for transfer. Although we must to some extent rely upon the good faith of prison officials the individual inmate is not left unprotected against such abuses. See Newkirk v. Butler, Slip Op. at 3893, 3899 (2d Cir., June 3, 1974)" Id. at 27, f. 4.

coercion could be more appropriate, or more morally and humanely imperative. The extremely painful and deleterious sanctions brought against SOSTRE in the Box at Clinton these many months are spread upon the record from the District Court with thick strokes:

> /T/hey just want you to submit and become institutionalized and become a robot and destroy your personality, and that's all that I have left. I was framed, I have had my freedom taken away from me, I have lost my business, I have had injustice piled on me on top of injustice, I'm locked away from all human contact 24 hours a day. I haven't had the sun on me unless I was taken out in the car because even in the -- tiger cage is what they call it. It's not even a back yard. You don't even get sun because it has an overhang on it. The first time I saw TV and music was at the county jail in months, so I don't have anyting to cling to. They just want to take your flesh, your freedom and your personality and everything else and to submit your dignity and humanity. They want complete submission, and this is the way they get it, by intimidation and brutality, loss of parole and privileges from the majority. There are a few of us who are standing firm and are holding the line, you know, trying to maintain some sort of civilized standard of decency that they cannot take from us.
>
> (T. 87)

The procedures which have kept MARTIN SOSTRE in Segregation for so many months are a patent sham, and the Court was in error in finding his sustained refusal to knuckle under to the wrongful insistence that he shave to be a series of separate offenses. Grossly

disproportionate punishment---endless harsh coercion---for the purpose of forcing a prisoner to submit to the will of the authorities has no place in a system ruled by our Constitution. Demeaning, dehumanizing treatment, arbitrary, unnecessary rules, and excessive, indefinite punishment all offend our inalienable rights. Such were the causes of Attica. Cf. generally The Report of the Official New York State Cpmmission on Attica.

The dissenting opinions of Judges Feinberg and Smith in Sostre v. McGinnis, supra, should be studied closely by this Court now, for within them is recognitiion of the inhumanity of excessive punishment and its substantially harmful effects. The standards of Sostre regarding disproportionate punishment must be expanded and re-defined in light of the Court's continued learning and understanding about prisons in America.

B. The Continuing Indefinite Punishment Endured By Appellant For Violating The No-Beard Rule Is Grossly Disproportionate, And Will Irreparably Harm Appellant If Not Forbidden By This Court.

This Court, in recently upholding a jury verdict awarding a prisoner $12,000, for twelve days of illegal confinement in punitive segregation at Attica, said that:

> Even though Appellee had two or three showers, one attorney visit and two visits to the prison hospital he was locked in his cell 24 hours a day for a period of 12 days.

> Ordinarily he would have at least 4 1/2 hours in the prison yard and meals with other inmates. He was forced to submit to the humiliating 'strip search' which included a probe of his rectum by prison guards. He was marched naked to the segregation cell where he waited an hour before being given clothing. Under the Dept. of Correctional Services regulations for segregation, 7 N.Y.C.R.R. § 301.5, he was entitled, unless there was 'imminent danger that an inmate will do injury to himself or to another,' to a minimum of one hour of exercise out of doors, weather permitting, each day, after the fifth day of confinement, or to one hour of exercise in the exercise room, but he was given neither. Finally the fact that he was kept five days longer than the Adjustment Committee had directed and five days longer than permitted under prison regulations, 7 N.Y.C.R.R. § 252.5 (e)(3), undoubtedly must have created an anguish and anxiety or fear of indefinite confinement to segregation, matters for which he is entitled to be justly compensated. Probably it would be difficult for anyone, juror. lawyer, or judge, properly to assess the pyschological impact of solitary confinement for 12 days, five of which are spent without knowing when the confinement is going to end. Cf. Rhem v. Malcolm, 371 F. Supp. 594, 601-607 (S.D.N.Y., 1974) aff'd in part, rev'd in part, No. 74-2072 (2d Cir., Nov. 8, 1974) Slip Op. 377,385.
> U.S. ex rel. Larkins v. Oswald, 74-1855 (1975) at 1441-2.

In the instant case, the District Court found that "confinement in Special Housing (Unit 14) results in a number of deprivation not conferred on the 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." (Opinion, p. 6). While this finding is not erroneous, it greatly

understates the magnitude of the punishment that Appellant has endured and will continue to endure for refusing to accept the no-beard rule.[17] There are a variety of lesser punishments available to the Adjustment Committee, including reprimand, loss of one or more specified privileges for a specified period, temporary or permanent "change of program," and the like, all much more commensurate with the minor infraction involved.[18] Instead the Appellant is kept locked in his cell 24 hours a days without real human contact. He is denied all visits and activities and has no comissary or earphones. As he put it: "I am on rock bottom, where they can't take any more." (T. 90)

Appellant is also subject to the degrading and dehumanizing rectal search rule, further discussed below in Point III. He has refused to submit to this demeaning practice, claiming it is an unreasonable search, without probable cause, which violates his constitutional rights. At those times when it is decided by prison officials that he must

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17. In considering the amount of punishment Appellant has endured for violation of the no-beard rule, this Court should also consider the punitive and harmful effect of the summary transfer from Auburn to Clinton which was in part a result of his refusal to comply with the no-beard rule. See Haymes v. Montanye, __F. 2d__ (2d Cir., 1974, No. 74-1200). See also Newkirk v. Butler.

18. N.Y.C.R.R., Chapter V, §§ 253.5

leave the Unit (e.g., go to court) the anus examination is done forcibly. This has resulted in eleven beatings. The seriousness and potential irreparable nature of the punishment being inflicted on SOSTRE is also reflected in the testimony of Dr. TEICH, who said that long-term solitary confinement encourages a disintegration of personality and development towards a psychotic process.[19]

It is obvious that this open-ended punishment of Appellant is grossly disproportionate, and he will continue to suffer irreparably if this Court permits it to be resumed.

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19. See also testimony of Dr. Seymour HALLECK who was an expert witness in Sostre v. Rockefeller, supra, where he testified that long-term isolation may have so serious an impact as in fact to destroy a person's mentality.

See also National Advisory Commission, supra, Standard 2.4, Protection against Personal Abuse.

III THE DISTRICT COURT ERRED IN DENYING PRELIMINARY RELIEF FROM THE ARBITRARY, PUNITIVE AND OVER-BROAD APPLICATION OF THE RECTAL SEARCH RULE BY DEFENDANTS AGAINST APPELLANT.

A. The Rectal Examination Rule In The Segregation Unit At Clinton Prison Goes Beyond Any Legitimate Purpose, And Is Enforced As Part Of The Sanction Of Solitary Confinement In Violation Of The Fourth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution.

It is a fundamental concept of our constitutional system that the privacy and dignity of the individual is sacrosanct, and cannot be invaded by the government except upon the showing of an overriding state interest.

> The security of one's privacy against arbitrary intrusion by the police--which is at the core of the 4th Amendment--is basic to a free society.
>
> Wolf v. Colorado, 338 U.S. 25, 27-8 (1949)

> The purpose of the Fourth Amendment is...to protect personal privacy and dignity against unwarranted intrusion by the State.
>
> Schmerber v. California, 384 U.S. 757, 767 (1966)

The right of privacy and personal dignity is not only a premise upon which the Fourth Amendment rests, but is protected by several other amendments. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court found the right of privacy to be protected by the "penumbra" of the Bill of Rights, invoking the First, Fourth, Fifth,

Eighth, and Ninth Amendments. In addition, an intrusion into the privacy of a person's body can be so offensive to human dignity and "shocking to the conscience" as to be violative of the due process protections of Fifth and Fourteenth Amendments. See e.g. Rochin v. California, 342 U.S. 165. 172 (1952); U.S. ex rel. Guy v. McCauley, 385 F. Supp. 193 (E.D. Wisc., 1974)

Whichever constitutional amendment is involved, the test is always one of balancing the individual's right to privacy and dignity against the state's reasonable interest in limiting or curtailing such right. In Palmigimo v. Travisona, 317 F. Supp 776 (D.R.I., 1970) the Court said that: "...the right to be free from unreasonable searches and seizures is one of the rights retained by prisoners subject of course to such curtailment as may be made necessary by the purposes of confinement and the requirements of security." Ibid.,[20] at p. 792. See also Terry v. Ohio, 392 U.S. 1 (1967).

In weighing the individual interest against the state interest, the Court must take into consideration the nature and extent of the invasion of privacy or human dignity com-

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20. Quoting from Camara v. Municipal Court, 387 U.S. 523, 534 (1967) the Supreme Court in Terry stated:

> There is no ready test for determining reasonable ness other than by balancing the need to search(or seize) against the invasion which the search (or seizure) entails.
>
> 392 U.S. at 21.

plained of, and whether the state has less drastic or more narrowly applicable means to accomplish its legitimate purpose.

In Schmerber v. California, 384 U.S. 757 (1964), the Supreme Court upheld the involuntary taking of blood from a car accident victim in order to determine if he was driving while drunk. The Court found that the taking of blood was done by a doctor, a practice not requiring force or implied force, and thus was not an overly offensive intrusion of privacy. The Court nevertheless set forth a minimum showing required before even such an otherwise non-offensive body intrusion could be permitted:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, the fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
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> 384 U.S. at 770. (Emphasis added)

The "clear indication" standard had been adopted by the Ninth Circuit as a pre-requisite to the requirement of body cavity searches in border-crossing cases. "...We need not hold the search of any body cavity justified merely because it is a border search and nothing more. There must exist facts creating a clear indication, or plain suggestion, of smuggling.: Rivas v. U.S., 368 F. 2d 703 (9th Cir., 1966) See also Henderson v. U.S., 390 F. 2d 805 (9th Cir., 1967).

For the less offensive and intrusive strip search, a lesser showing has been called for in the cases, with the same Ninth Circuit requiring that officers harbor a "real suspicion," based on "objective, articulable facts," before the search can be lawfully demanded. United States v. Guadalup-Garza, 421 F.2d 879 (9th Cir. 1970)

The "real suspicion" test was adopted by Chief Judge John T. Curtin in a recent opinion enjoining the Erie County Jail from requiring an indicted Attica defendant from submitting to a strip search before he entered to see his co-defendants. See Big Black v. Amico, __F. Supp. __ (W.D.N.Y., Dec., 1974) Talking about a strip search even without its more degrading anus examination component, the Court said:

> A strip search of a visitor is a degrading and embarrassing experience and should be permitted only when less offensive measures would not render the facility secure. Generally speaking, any search made without a warrant is deemed to be presumptively unreasonable and a violation of a constitutional right. The burden is on the state to justify the reasonableness of the intrusion under the surrounding circumstances and point to specific facts which justify a transgression of the type proposed. Slip Opinion.

In the coercive, demoralized atmosphere of a maximum security prison, bowing down and spreading your buttocks in order for your captors to inspect from behind is at best fearful and degrading. It also

concretely raises the explicit suggestion and ultimate convict's fear of sodomy and rape. It is indeed a profound and loathsome invasion of privacy and dignity, and should clearly be forbidden in all but the most pointedly obvious cases. (T. 86) A rule which automatically requires rectal searches of persons confined to Segregation, as a further punitive aspect of such confinement, is in no way related to a legitimate interest of the state, and is an abuse of the discretionary power of prison officials in maintaining order and security in the prison. Compare Daughtery v. Harris, 476 F.2d 292 (CA 10, 1972) mistakenly relied on by the District Court here, in which the court held that on the record before it the rectal search was not an abuse of discretion. See also the new rules now in effect in federal prisons, in Appendix C.

The rectal search rule at Clinton is onerous and overbroad, and has great potentiality for (and history of) abuse, as a pretext for harassment and unlawful corporal punishment. Under these circumstances its further application should be preliminarily enjoined, until proper standards and limitations can be determined on a full record after a trial.

B. The Potential Harm To The Plaintiff From The Continued Enforcement Of The Rectal Search Rule Against Him If He Is Returned To The Box Is

Immediate And Irreparable, And The Record Below Shows That At A Full Trial For A Permanent Injunction Plaintiff Has A Good Likelihood Of Establishing New Constitutional Limitations on Its Use In Prison.

Plaintiff clearly showed upon the record in the District Court, and Defendants failed to rebut, that the enforcement of the anus examination rule against him in the Box at Clinton has led to a gread deal of suffering and deprivation, all of it unjustified, which will doubtless continue in the absence of some restrictive action by the Court. Since he has conscientiously refused to submit to the search, upon his firm belief that it is a gross violation of his fundamental human and constitutional rights; and since the prison remains adamant about the use of force to impose the search upon him when they wish (and about denying him visits or other amenities when he will not submit voluntarily), he is threatened with great harm if he returns to the Box before the matter is resolved by a full trial on the issue of permanent relief. He can expect to be beaten up when this Court's stay is ended, and he goes back in, and at any time he comes back out. In addition, he can expect to remain on "minimum privileges," and to be denied all visits, including visits from his attorneys. Surely

this is enough in the way of a threat of "irreparable" harm to satisfy the requirement of the law of preliminary injunction. See, e.g. Inmates of Attica v. Rockefeller, 453 F.2d 12 (2d Cir. 1971)

Appellant has claimed that the rectal search is used to punish, intimidate, and coerce, without any legitimate need from a security standpoint. Defendants have agreed this would be wrong and impermissible, but deny that it has happened. SOSTPE's uncontradicted testimony, however, strongly supports the preliminary conclusion that it does happen, and the record below thus indicates a good likelihood that some action will be taken by the Court pursuant to a trial on the merits. Unless the very possibility of abuses already factually established be negated, it seems quite likely that some judicial standard will emerge which limits use of the rectal search to circumstances where reasonable grounds exist for requiring it, and forbids its use as a punitive or coercive measure, either by rule or actual practice.

The likelihood of success on the merits exists on a level sufficient to warrant injunctive relief, and the prospect of irreparable harm is forcefully clear. The District Court's decision denying the Motion for

Preliminary Injunction should therefore be reversed by this Court, and the case remanded; with instructions to the District Court to enter an order protecting the Plaintiff until a trial can take place.

Respectfully submitted

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MODEL RULES AND REGULATIONS

Rule IA-6 Appearance: Dress and Hairstyle

Although an appropriate level of neatness is expected, inmates shall be free to adopt any style of haircut, beard, goatee, or moustache, subject only to such following regulations as are made necessary by occupation, health, or security requirements.

(1) Inmates assigned to food preparation and handling and working in food storage and serving areas may be required to wear a hairnet or other covering, or may be required to maintain suitably cropped hair to keep hair from food and food contact surfaces.

(2) Inmates shall receive advance notification of those other work assignments which may reasonably be determined by the superintendent or his designee to be a safety hazard to those with long hair or beards. Inmates unable or unwilling to conform to safety requirements of a particular job shall be assigned elsewhere.

(3) Should examination of an inmate's hair or living quarters reveal the presence of vermin, medical treatment shall be initiated as soon as possible. The cutting of an inmate's hair is permissible under these circumstances.

(4) Whenever it becomes apparent that the growth of hair, beards or moustaches on an inmate may create a problem in positive identification, a new photograph may be taken of the inmate and placed in his file.

(5) It shall be the policy of the institution to encourage individuality among inmates by offering as much dress variety to inmates as is consistent with the inherent resources and financial limitations of the institution.

Commentary

The basic thrust of the proposed regulation on dress and appearance is that absent clearly defined circumstances, inmates should be permitted to individualize their appearance. Current Massachusetts policy seems to be moving along this road. Although the scope of the regulations has not as yet been constitutionally required under the First Amendment, there are policy considerations which do support them. Encouraging individuality in appearance will enable an inmate to alter his image and personality with respect to others and give him the opportunity for improvement. Secondly, the varieties in appearance will aid in the breakdown of conformity in habits and ideas which is prevalent among so many men in close living quarters for long durations. Finally, with more of a visible outlet for inmate decision making, correctional personnel will be better able to recognize and evaluate subtle changes in personality. ETC.

APPENDIX B

(c) The wearing of beards, mustaches and sideburns by male prisoners and the hair styles of both male and female prisoners are governed by such factors as proper security, sanitation and prisoner identification, and the prevailing modes in society generally and the community in which the prisoner resides. Considering these factors, each sheriff or official in charge shall set standards for the facility under his jurisdiction so as to insure that they cannot be construed as discriminatory, arbitrary or capricious in that they shall apply equally to all prisoners. The use of a psychiatric type or similar lock-type razor which provides for proper control of razor blades by officials is urged. If budgetary allotments are adequate, haircutting should be accomplished by a properly qualified or licensed barber but otherwise the services of a staff member or a prisoner with necessary skills in the use of barber tools may be utilized. Haircutting, hair styling and shaving should be accomplished in conformance with accepted sanitary standards and preferably under the supervision of staff employees.

UNITED STATES PENITENTIARY
TERRE HAUTE, INDIANA

POLICY STATEMENT

TH-2071.1

7-10-74

SUBJECT: PERSONAL SEARCH AND INSPECTION FOR CONTRABAND.

1. PURPOSE. To set forth instructions guiding personnel at the U. S. Penitentiary Terre Haute, Indiana, in procedures to be followed in cases of all personal searches and/or inspections for contraband where body cavities are to be examined.

2. POLICY. It is the policy of the Bureau of Prisons and this institution to establish adequate security against the introduction, possession, and/or use of contraband. A personal inspection of body cavities may be authorized where a reasonable belief exists that contraband will be found; where medically approved methods are used, and less intrusive methods of inspection will not suffice.

3. DEFINITION. Contraband may best be defined as any item or article introduced or possessed on the institution grounds that was not issued by this institution, purchased in Commissary, purchased through approved channels (i.e. Education Department), or approved for issue by an authorized staff member.

4. PROCEDURE.

a. The human body may serve as a potential hiding place for contraband. For that reason, it may become necessary at times to have an inmate undress so a thorough search can be made of his person (i.e. upon arrival at institution, after escape or hide-out and before admission to segregation, when suspected of carrying contraband after contact with the public, etc.).

b. On occasion, there may be reason to believe that an inmate is concealing or smuggling contraband that will not be revealed by a routine body search. The Correctional Supervisor in charge may authorize the search of body cavities where a reasonable belief exists that contraband will be found in the area to be inspected, where contraband could not be found by other less intrusive methods of inspection, and where medically approved methods are utilized. Contraband in the possession of an inmate, being metal or enclosed in metal, can be detected by "frisker" or fluoroscope.

c. Should a digital inspection of the body cavities be deemed necessary by the Correctional Supervisor in charge, the hospital staff will be immediately notified of the pending search. The inmate in question will be escorted to the hospital where a digital examination will be performed by a Physician's Assistant or other medically qualified personnel. The escorting officer will be present during the examination. In cases or incidents where medical reasons prohibit cavity examinations or cavity probing, as determined by the medical staff, the inmate should be isolated from population until an examination is medically approved or until a reasonable belief that contraband will be found no longer exists.

(1) Should any contraband be disclosed by this examination, great care should be taken for the handling and preservation of same for use as evidence should prosecution result.

(2) Any Correctional Supervisor ordering a cavity search will document reasons for same in a detailed memorandum which will be addressed to the Captain. This report will include name and number of inmate, reasons for authorizing the search, the time of the examination, medical staff member who performed the examination, and results. Copies of the memorandum will be routed to the following:

Associate Warden (P)
Associate Warden (O)
Staff Duty Officer
Hospital Administrator
Central File

C. L. Benson

C. L. BENSON
Warden