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PRELIMINARY MEMORANDUM

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No. 77-1829 CFX

BELL (Attorney General)

Cert to CA 2 (Kaufman,
Timbers, Meskill)

v.

WOLFISH et al (pretrial detainees) Federal/Civil Timely (by ext)

1. SUMMARY. The SG petitions for cert to review CA 2's decision holding unconstitutional a wide range of pretrial detainment practices in the federal Metropolitan Correctional Center (MCC) in Manhattan. The SG presents two main issues for review. First, he points to a three-way conflict among the court below, CA 1 and CADC regarding the correct constitutional standard to be applied in assessing due process limitations on pretrial confinement conditions. The SG contends that the "strict scrutiny" approach adopted by CA 2 below is inconsistent with prior decisions of this Court. Second, he argues that CA 2, in declaring specific practices unconstitutional here, failed to com-

ply with this Court's decisions acknowledging the Govt's compelling interest in maintaining prison security and order, and requiring deference to prison officials' determinations as to how this interest can best be achieved. The SG points to at least one circuit conflict regarding the legality of the practices involved in this case.

2. FACTS. The Manhattan MCC has as its primary purpose the housing of persons detained in custody prior to trial for federal criminal offenses; it also houses some convicted inmates awaiting transfer and a few inmates sentenced to serve their terms there. The MCC was built in 1975 and represents, in CA 2's words, "the architectural embodiment of the best and most progressive penological planning." Its design replaces traditional cellblock construction with self-contained residential units, or "modules," which, by eliminating routinized movements of detainees from one activity area to another, were meant to "humanize staff-inmate relations and provide a more 'homelike' atmosphere, affording inmates greater privacy and freedom than jails of earlier construction." Each module contains private rooms that open onto common areas; the common areas have recreational and exercise equipment, telephones, color TVs, books, food preparation and dining facilities, and visiting rooms. The floors are carpeted and the windows have clear glass with no bars. There is a rooftop recreational area with basketball, volleyball, and handball courts, as well as gym equipment.

Just prior to the MCC's opening the number of pretrial detainees rose at an unprecedented rate. Despite persistent efforts, the Bureau of Prisons was unable to transfer enough inmates to reduce the population below the MCC's planned capacity. To provide sleeping space for these increased numbers, the MCC replaced single beds with bunk beds in 20% of the private rooms and installed bunk beds in the dormitory rooms so as to double their capacity. At certain times a small number of detainees were given temporary quarters in the common areas;

these persons were moved to private rooms as soon as possible.

Four months after the MCC opened resp filed a pro se habeas petn in federal court, challenging the alleged overcrowding and a vast array of other practices as violative of his constitutional rights. The suit was declared a class action on behalf of all persons confined, both pretrial detainees and sentenced prisoners. In a pair of preliminary injunctions, one opinion rendered on summary judgment, and a 125-page opinion rendered after trial, SDNY (Frankel, J) enjoined no fewer than 20 MCC administrative practices on constitutional and statutory grounds.

3. OPINION BELOW AND CONTENTIONS. CA 2 began by narrowing the issues before it. First, it reversed the DC's order insofar as it was premised on a finding that the Attorney General had breached his statutory duty to provide "suitable" care for inmates in his custody. The AG's actions in this respect, CA 2 held, were "committed to agency discretion by law" and hence judicially unreviewable. Second, CA 2 remanded the DC's findings of unconstitutional deprivations insofar as they related to sentenced inmates. The court noted that the DC had applied the same heightened level of scrutiny to restrictions on convicted persons as to restrictions on pretrial detainees, and held that a lower level of scrutiny under the 8th Amendment was properly applicable to the former. Third, CA 2 held that the DC's injunctions against certain MCC practices intruded too far into the minutiae of prison administration. Judge Frankel, for example, had (1) abolished the MCC's policy requiring visitors to request a bathroom key from a correctional officer; (2) ordered the MCC to take commissary requests every other day rather than twice a week; (3) ordered the MCC to install 23 telephones so that inmates could make long-distance calls; (4) ordered that inmates be permitted to possess typewriters for personal use; (5) found the prison attire "garish, ill-fitting, degrading and

humiliating to wear" and ordered the MCC to "permit pretrial detainees to wear their own clothes unless they volunteer to wear correctional uniforms."

Although CA 2 detected some dissonances in Judge Frankel's treatment, however, it affirmed his opinion in the main. Specifically, it approved (a) the heightened level of constitutional scrutiny that he had applied to restrictions on pretrial detainees and (b) his application of those standards to the practices concerned.

(a) Constitutional Standards. CA 2 held squarely that "strict scrutiny" applied. Because an individual is presumed innocent until proven guilty, pretrial detainees must be accorded as far as possible the same rights as unincarcerated individuals. Accordingly, it is not enough that the conditions of their confinement "merely comport with contemporary standards of decency prescribed by" the 8th Amendment. Rather, the "indisputable rudiments of due process" dictate that pretrial detainees "be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.'" Under this standard of "compelling necessity," deprivation of detainees' rights cannot be justified by "the cries of fiscal necessity," "administrative convenience," or "the cold comfort that conditions in other jails are worse."

The SG contends that CA 2, by proscribing all restrictions on pretrial detainees that are not justified by a "compelling necessity," and by eliminating fiscal and administrative constraints as possible justifications, has enunciated a constitutional standard more stringent than that adopted either by CA 1 or CADRC in their recent pretrial detainment opinions. In Feeley v. Sampson, 570 F2d 364 (1978) (Campbell, Markey (CCPA); Coffin, dissenting), CA 1 promulgated a "reasonable relationship" test. Judge Campbell there wrote:

While detainees are not convicts, the same practical reasons that counsel judicial restraint in second-guessing correctional officials dictates restraint in second-guessing the authorities who run jails....We believe that the proper standard by which to review the actions of those lawfully entrusted with the custody of detainees is that normally employed in reviewing administrative actions: whether the actions of jail authorities are arbitrary or capricious; whether they are lacking in a reasonable relationship to the limited purpose of the confinement; and whether they are otherwise not in accordance with law.

Id. at 371. The majority expressly rejected the "strict scrutiny" approach taken by the DC, under which "a state carries the burden of justifying every restriction imposed on an inmate on the basis of 'compelling interest', and must further demonstrate that each measure taken is the 'least restrictive alternative'." Id. at 370. Rather, said the majority, due process requires only that the conditions of confinement bear "a reasonable relation to the state's purpose in confining a detainee," id. at 369; that the state play "its limited custodial role in a reasonable, and hence a humane, manner," id. at 370; and that the detainee "be treated in a manner rationally related to the limited purpose for which he is imprisoned." Id. Judge Coffin dissented, believing that a higher standard of review was appropriate.

In Campbell v. McGruder, ^{580 F2d 521} No. 77-1350 (CADC 30 March 1978) (Bazelon, Leventhal; MacKinnon, dissenting), CADC enunciated a standard intermediate between CA 2's "compelling necessity" and CA 1's "reasonable relationship" tests. Judge Bazelon stated that pretrial detainees possess a "liberty interest...rooted in the presumption of innocence." Slip op at 13. Accordingly,

each restriction of the jail regimen must be carefully examined to determine if it is justified by substantial necessities of jail administration. To evaluate these necessities we will look to the needs of the state to produce the detainee for trial, to maintain the security of the jail, or generally to sustain the institution of pre-

trial detention at a feasible cost.

Id. at 17 (emphasis added). The majority specifically acknowledged the Govt's interest in being able "to manage the institution of pre-trial detention in an administratively feasible manner." Id. at 12. The majority held, however, that under certain circumstances this "balancing approach" must yield to a higher level of scrutiny. "[C]onditions of confinement that are likely to impair a detainee's mental or physical health," id. at 18, or which may impede a defendant's preparation or presentation of his defense at trial, "are constitutionally suspect and can be justified only by the most compelling necessity." Id. at 19. Judge MacKinnon dissented, rejecting the majority's reliance on the presumption of innocence, diss op at 32-33, and contending that greater deference to the judgments of prison authorities was required, id. at 36-37.

The decisions of CA 1, CADC, and CA 2 enunciate three distinct due process standards: a "reasonable relationship" test, a "substantial necessity" test allowing administrative and fiscal concerns as justifications, and a "compelling necessity" test allowing no administrative or fiscal justifications to be asserted. The SG notes that CA 4 has "adopted a standard that parallels the Second Circuit test." Petn at 21 n.16, citing Patterson v. Morrisette, 564 F2d 1109 (1977). Judge Coffin in Feeley noted that CAs 3 & 7 have adopted "rational relationship" tests similar to CA 1's. See 570 F2d at 378. The DC Circuit's intermediate test seems to stand alone, although the SG suggests rather optimistically that its test and CA 1's "lev[y] essentially similar requirements." Petn at 19.

After pointing out the circuit conflict, the SG argues that the due process standard adopted by CA 2 lacks substantial support in this Court's decisions. The SG initially questions the reasoning of both CA 2 and CADC that the "presumption of innocence" is a

heightened level of scrutiny for confinement conditions imposed on pretrial detainees. As CA 3 recently has noted, the "presumption of innocence" is not a source of substantive rights; it serves rather

[to] allocate[] the burden of proof. It is a principle of evidence,...acting as the foundation for the procedural due process requirement of proof beyond a reasonable doubt.... If the "presumption of innocence" is read literally to apply to all pretrial procedures, it is impossible to justify bail or pretrial detention, both of which are restraints imposed upon an accused despite the presumption.

Hampton v. Holmesburg Prison Officials, 546 F2d 1077, 1080 n.1 (1976).

Following the reasoning of CA 3, the SG stresses that pretrial confinement--notwithstanding that it is itself a fundamental deprivation of liberty--is implicitly authorized by the 8th Amendment and is justified by the governmental interest in controlling crime. The prisoner, moreover, is afforded a hearing prior to commitment. Once detention is ordered, therefore, the conditions of the detainee's confinement, unless they trench on specific constitutional guarantees, such as 1st Amendment freedoms, impinge directly only on detainees' "understandable desire to live comfortably during detention." This Court has never elevated "the individual's interest in economic comfort to the level of a fundamental constitutional interest." This Court, moreover, has consistently held that the conditions of confinement are shaped importantly by considerations of prison order and security--considerations which are "peculiarly within the province and professional expertise of corrections officials" to whose judgment courts "should ordinarily defer." Jones v. North Carolina Prisoners' Labor Union, 433 US 119, 128 (1977), quoting Pell v. Procunier, 417 US 817, 827 (1974). The SG concludes that under this Court's decisions the proper standard of review is as follows:

[I]n reviewing practices of detention for pretrial detainees under the Due Process Clause, unless a practice abridges a specific, fundamental right guaranteed by other provisions of the Constitution, the practice should be upheld if it is reasonably related to the objective of confinement and the inherent needs of the institution for security, order and safety. Furthermore, in determining whether living conditions during confinement are decent and reasonable, consideration should be given to cost, administrative feasibility, and available practical alternatives.

✓ Resp seems to concede that the constitutional standards announced by CAs DC, 1 & 2 are mutually inconsistent. Whereas the SG says that ✓ CADC's test is "essentially similar" to CA 1's, however, resp thinks it "articulates the same substantive principle" as CA 2's. Resp contends in any event that this case is "an inappropriate vehicle for meaningful resolution" of the differences among the circuits, since the practices held illegal below would be invalidated regardless of which standard of review were applied. Resp agrees with the SG that this Court's cases compel deference to the opinions of correctional officials; resp contends, however, that the record and decisions below indicate that great "attention, consideration, and deference" were accorded the views of prison officials here.

(b) Application of the standard to the practices involved.

CA 2 upheld the DC's injunction against approximately a dozen MCC administrative practices. Although the Govt professes to disagree "with virtually all" of CA 2's determinations, the SG has decided, "in order to avoid unduly complicating this Court's task should it elect to grant review in this case," not to seek review of them all. In some cases, the adverse impact of CA 2's ruling will be minimal; in others, the Bureau is rethinking its position anyway. The SG ✓ presents five issues for review:

(1) Overcrowding. CA 2 held that the overcrowded conditions violated detainees' constitutional rights of privacy. Placements of bunk beds in private rooms ("bunking") and the

"virtually no space for minimal privacy or in which to avoid the other's presence." Double-celling, moreover, put more pressure on the common-area facilities, creating pressure "to eat in the cell, with its single chair, open toilet, and unsolicited companion." Because the Govt made "no showing of compelling necessity to justify the substantial abrogation of personal privacy imposed by double-celling," CA 2 held the practice unconstitutional. CA 2 also held that the temporary quartering of detainees in the common areas, where "the lights burn[ed] all night," gave inmates "no means of securing any degree of privacy." Since the MCC had "offered no explanation for this completely inadequate housing except administrative convenience," CA 2 declared it unconstitutional as well.

The SG replies that the double-celling was confined to 20% of the rooms; notes that the rooms were 75 feet square, significantly larger than those in previous cases finding overcrowding; and observes that detainees in the MCC in any event are confined to their rooms for only 7-8 hours per day, during which time "they are presumably asleep." Testimony at trial, moreover, indicated that double-bunking would have no "significant detrimental effects on the physical or psychological health of the inmates." Even assuming that a significant abridgment of personal privacy did occur, CA 2 erred in evaluating it under a "compelling necessity" test that accorded no weight at all to the fiscal and administrative constraints the MCC was operating under. The level of care did not fall below the minimum threshold of decency and humane treatment (citing Feeley). Finally, the SG argues that CA 2 has gone far beyond even its own precedents: a previous case, cited by CA 2 as support here, involved double-celling in rooms 48 feet square amid decidedly more archaic and unpleasant surroundings.

Resp relies on the analysis of CA 2 and asserts that the SG's

position in this case is "ironic," given that the Govt "has been prominent in its criticism of [double-celling] in state and local facilities."

(2) The "publisher-only" rule. The MCC enforced a Bureau of Prisons' rule, applicable to all its facilities, under which inmates can receive books only if mailed directly from the publisher or a book club. Federal corrections experts testified at trial that this rule was adopted to avert substantial security risks occasioned by inmates' receipt of books from other sources: books and magazines are easily used to smuggle drugs or money into jail; detection of these items in books is difficult; and an adequate inspection for such items often unavoidably destroys the books anyway. CA 2 held that the publisher-only rule "severely and impermissibly restricts the reading material available to inmates" and thus was "inconsistent with both the first amendment and due process." CA 2 dismissed the availability of the prison library by finding it "inconceivable that the first amendment rights of an incarcerated individual do not extend beyond a few, selected titles." CA 2 dismissed a decision of CA 10 upholding the publisher-only rule, Woods v. Daggett, 541 F2d 237 (1976), on the grounds that that case involved Leavenworth, where security justifications were more compelling.

The SG urges that the publisher-only rule is a reasonable accommodation between inmates' interests and prison security concerns. Other avenues to reading materials remain open, viz., books mailed from publishers and book clubs and books in the prison library. The SG says that CA 2 erred in ignoring the unanimous testimony of corrections officials that an item-by-item inspection of all arriving books would be unmanageable. The SG, finally, points to the circuit conflict with Daggett.

Resp contends that the publisher-only rule effectively leaves in-

mates no options: books cost money, publishers' names are hard to get, and the prison library is laughable. Resp asserts that the Justice Dept, in a June 1978 draft of Federal Standards for Corrections has taken the position that inmates "may receive publications from any source, subject to search and inspection, except where there is clear and convincing evidence to justify limitations."

(3) Packages. The MCC prohibited inmates from receiving packages containing items of personal property. Corrections officials testified that this rule was necessary to avoid fighting, stealing, and extortion among inmates, and also to limit the introduction of contraband. The DC dismissed these concerns as "dire predictions" and ordered the MCC to promulgate regulations permitting receipt of at least some items. CA 2 agreed, noting that the DC "did no more than instruct the MCC to devise reasonable regulations" and that its action thus was "not inconsistent with the tenet that prison officials should retain as much control as possible over their institutions." Neither the DC nor CA 2 said what constitutional provision was violated by the no-packages rule.

The SG contends that CA 2's holding gives no deference to the security concerns voiced by expert witnesses at trial. There was no suggestion in the record that these concerns were disingenuous or exaggerated, and under these circumstances the regulation should have been upheld unless the corrections officials had been "conclusively shown to be wrong." Jones v North Carolina Prisoners' Labor Union, 433 US at 128. Resp contends that the regulation was arbitrary and capricious since inmates could purchase items of personal property at the commissary anyway--which presumably should give rise to the same "security" problems--and since there were other ways of policing introduction of contraband.

-12-

(4) Room searches. The MCC required inmates to leave their rooms during routine inspections for contraband. Trial testimony indicated that the rule was necessary to avoid friction between inmates and prison officials and to thwart attempts to conceal contraband. CA 2 held that this requirement was unconstitutional. The searches were "far from neat" and often caused tension among inmates who "suspected the officers of thievery." CA 2 saw

no reason whatsoever not to permit a detainee to observe the search of his room and belongings from a reasonable distance. This is a small privilege to grant him and reassures the detainee's already diminished sense of control over self, that he still has some small private domain, while at the same time not interfering with the institution's security concern and the removal of possible contraband.

The SG contends that "[t]here is no authority for the proposition that persons--either inside or outside of jail--have a privacy interest that requires that lawful searches of their premises be conducted in their presence." The SG points out that CA 2's finding of "no reason whatsoever" not to permit detainees to observe the search was inconsistent with the evidence at trial. The SG contends, finally, that CA 2 has ignored this Court's injunction that prison officials, "not courts, [make] the difficult judgments concerning institutional operations in situations such as this." Jones, supra, 433 US at 128.

Resp replies that, given the circumstances under which the inspections were made, the search would be "unreasonable" absent detainee observation. The officers rummaged through possessions willy-nilly and their actions constituted, in CA 2's words, a "regime of tyranny." Resp contends that prohibiting detainees from being present is an overbroad means of thwarting attempts to conceal contraband.

(5) Body Searches. The MCC, unlike many prisons, permits inmates to have "contact visits" with guests, U.S., 100 F.3d 1000

-13-

without a glass or wire screen intervening between the interlocutors. Because contact visits "present a unique opportunity for passing contraband, including weapons and drugs, into the Jail," Feeley, supra, 570 F2d at 373, the MCC requires inmates after contact visits to strip naked and expose their armpits and the soles of their feet. In addition, they are required to submit their anal and genital areas to visual inspection. The DC left the basic strip search undisturbed, but found that the anal and genital inspections "plunged the inmate into a deep level of degradation and submission." He enjoined such visual inspections absent probable cause to believe that an inmate is hiding contraband. CA 2 agreed. It noted that the MCC had proved "only one instance in the several years of [the practice's] existence when contraband was found during a body cavity inspection," and held that the "gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." CA 2 found that the procedure "shocks one's conscience," citing Rochin v. California.

✓ The SG notes that body cavity searches have been upheld by CA 10 and by DCs in five other circuits. He contends that CA 2 erred in finding such searches of "little actual utility;" this observation "wholly ignores the substantial deterrent effect that such searches inevitably have on efforts to pass contraband to inmates during contact visits." The MCC's search policy, says the SG, is a necessary concomitant to its relatively liberal policies in allowing contact visits, policies the MCC is reluctant to restrict. The SG contends, finally, that CA 2 has again improperly substituted its judgment for that of prison officials.

Resp contends that body searches are unnecessary, since the Govt's

-14-

security interests can be achieved by far less restrictive means. Passing of contraband during contact visits is virtually impossible, since inmates and visitors are constantly monitored by officials through visiting-room windows, inmates wear one-piece jumpsuits which make surreptitious concealment of contraband impracticable, and inmates are not permitted to use the visiting-area rest room where passage of contraband might occur. Concealment of objects in the anal area also produces an "unusual gait" which invites suspicion. Resp notes, finally, that the Justice Dept's 1978 draft Standards propose to allow body cavity searches only when contact visits are "not constantly monitored." As noted above, contact visits at the MCC are so monitored.

5. DISCUSSION. The issues the SG presents for review defy easy answers no less than they defeat terse statement. Although cases involving the rights of pretrial detainees have flooded the lower courts in recent years, this Court has never dealt with these questions comprehensively--a fact that lower courts have both noted and bemoaned. Although this Court's pronouncements on the rights of convicted prisoners have figured largely in those courts' considerations, those pronouncements--involving persons with considerably diminished "liberty" interests--have been as often distinguished as followed.

Given the frequency with which pretrial detainment questions arise the circuit conflict as to the proper constitutional standard of review is bound to cause confusion among the district courts. The SG is correct, I believe, in saying that the three-way conflict is both substantial and real. The "compelling necessity" test adopted by CA 2 below, moreover, seems problematic on a practical no less than on a theoretical level: it is hard to imagine any restriction that could pass constitutional muster thereunder. Once fiscal and adminis-

✓ trative justifications are eliminated, bail itself may stand condemned. House arrest could do the job, albeit more expensively, as well.

This case, additionally, presents questions of pretrial detainment in a peculiarly unadulterated guise. This case does not involve ramshackle jailhouses in remote county seats, equipped with the Dickensian amenities of an archaic age. It involves a modern federal facility built three years ago, designed and equipped with the best that contemporary architecture and penology can devise. If the Govt has not succeeded here, one is tempted to despair of success at all.

Finally, despite the large number of pretrial detainment cases that have been decided in the past three years, this is apparently the first case in which the SG has sought cert. It is hard not to suspect that he has been "sandbagging," waiting for the right case to come along. In my judgment, CA 2 in this case has cooperated handsomely.

Grant.

There is a response.

9/1/78

Lauber

Ops in petn

9/6/78

This is an important case and I think the decision below was wrong. I apologize for the length of the memo.

Grant. Age