A 11/19/80 ORDER

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

NICHOLAS A. PALMIGIANO, et al.	)	
	)	
v.	)	Civil Action No. 74-172
	)	
J. JOSEPH GARRAHY, et al.	)	
THOMAS R. ROSS, et al.	)	
	)	
v.	)	Civil Action No. 75-032
	)	
J. JOSEPH GARRAHY, et al.	)	

OPINION

PETTINE, Chief Judge. The Special Master's findings of fact and recommendations are now before me for review, a ruling and the entry of an appropriate order. Clarity and understanding requires acquaintance with the history of this complex matter which dates back to December 3, 1979, when the defendants filed simultaneously a motion requesting the Court to reverse its 1977 decision that the Maximum Security facility of the Adult Correctional Institutions (ACI) was unconstitutional and their third draw-down plan for the reduction and redistribution of the population of Maximum Security. These pleadings obviously were contradictory; while the request that the Court reverse its finding of unconstitutionality presumably reflected the defendants' intention to continue use of Maximum Security, the draw-down plan contained the defendants' latest schedule for

responding to the Court's requirement to abandon that facility.

Since the draw-down plan responded directly to the Court's August 10, 1977 Order to close Maximum Security upon the scheduled opening of the new High Security Facility (Supermax), the Court turned first to it, while withholding judgment on the motion to modify its condemnation of Maximum Security. The key component of the defendants' draw-down plan, which was first rejected by the Court and subsequently resubmitted, was a proposed expansion of Supermax from its present capacity of 96 to 260. The expansion, completion of which would enable the defendants to close permanently the present Maximum Security facility, was to cost the State some $5.83 million, and a special bond issue referendum for that amount was submitted to the voters on July 29, 1980.

When the voters overwhelmingly rejected the bond issue, the defendants once again found themselves with no meaningful plan for the reduction of the population of Maximum Security as required by the August 10, 1977 Order. The defendants, therefore, renewed their request that the Court review their efforts to improve coditions in Maximum Security over the past three years and reconsider its stand on the unconstitutionality of the facility. Indeed, if the defendants are now to prepare a realistic draw-down plan, they must know whether and for how long they will be permitted to retain part or all of the present facility in operation.

It could be said that this is a time of crisis in the long development of this suit. In August, 1977, this Court unequivocally ordered the

defendants to close Maximum Security. That order followed a showing that the:

> Maximum Security Building has outlived its usefulness. It is incapable of being safely used for any group of inmates requiring security control, or indeed even for more than 300 minimum security inmates who work all day in outside-the-prison programs. The Maximum Building is incapable of any use for any number of inmates without jeopardizing their physical health and safety without massive reconstruction, which it is agreed by all is financially unfeasible. The Department's own architect gave his opinion that Maximum is useful only as a warehouse, which, indeed, it has become.
> Palmigiano v. Garrahy, 443 F. Supp. 956, 977 (D.R.I. 1977)

Originally, the closing of Maximum Security was to occur within a year of the August 10, 1977 Order; later the closing was extended to December 31, 1979 and, finally, it was made contingent on occupation of Supermax by the defendants. * The time of that last extension is at hand, and the Department of Corrections is presently making final preparations to move into Supermax. Under the standing order of this Court, use of

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* The situation is further complicated by the fact that the present Maximum Security facility houses both convicted offenders and pretrial detainees. The former were to have been removed on completion of Supermax; the latter on completion of the Intake Services Center, a facility currently under construction and scheduled for completion in April, 1981 for pretrial detainees and convicted offenders undergoing the admission and orientation process. This opinion treats directly only convicted offenders, who under existing court orders are required to be removed from Maximum Security as Supermax opens; the defendants continue to have until the opening of the Intake Services Center to remove pretrial detainees from Maximum Security.

Maximum Security is supposed to terminate when that occupation is completed.

As long ago as January, 1979, the Special Master reported to the Court the fact that the population projections upon which the defendants had relied in their plans for an end to the use of Maximum Security had gone badly awry. The first two draw-down plans submitted by the defendants in February, 1978 and September, 1978 both anticipated that a stable overall population and improved classification would reduce the number of prisoners at the ACI requiring maximum security custody to under a hundred, the projected size of Supermax. In January, 1979, however, the Special Master pointed out that, after some initial decline in the number of prisoners at the maximum security level of custody at the ACI, the number was swelling steadily and already had reached approximately 225. The defendants' planning assumptions about a stable population and the impact of improved classification turned out to be unfounded. These new figures were clearly a cause for alarm, since less than half could be accommodated in Supermax and Maximum Security was to be closed when Supermax opened.

In the intervening 21 months since the Special Master raised that issue, the defendants have struggled unsuccessfully to come to grips with the inexorable logic of the new numbers. In May, 1979, they sought the Court's permission to improve substantially and retain a portion of the

old Maximum Security facility (Cellblocks GHI and JKL, including the present Behavioral Custody Unit or BCU); in December, 1979, defendants scrapped that plan and proposed the $5.83 million expansion of Supermax, which implied at least an intention to close the present Maximum Security.

In hindsight, it is difficult to discern whether the defendants ever took their expansion plan seriously. The likelihood of passage of the bond issue was miniscule; the Department's justification for the expansion was riddled with inconsistencies and unsupported by convincing data; the defendants continued to press for a legislative appropriation to renovate Cellblocks GHI and JKL (BCU); and, finally, they offered the Court no alternatives to the expansion project as a fall-back or contingency position should the bond issue fail. It is not hard to see in this pattern either an unwillingness to plan aggressively to meet the Court's order or a gross deficiency in planning skills. To no avail, the Court and the Special Master repeatedly have suggested over the past two years a range of alternative approaches to the pending crisis that the defendants might pursue, but each suggestion has been rejected out of hand by the defendants. Thus it happens that the defendants now, on the eve of their occupation of Supermax, look to the Court to rescue them from the dilemma of their own making by reversing its finding that Maximum Security is an unconstitutional facility.

The chief argument for their motion advanced by the defendants is that improvement of conditions has brought Maximum Security into compliance with all of the mandates of the August 10, 1977 Order, thereby rendering the sum of the "totality of conditions," found in 1977 to entail cruel

and unusual punishment, substantially less today. On review of the defendants' motion after defeat of the July bond issue, the Court decided that the request involved factual allegations about improvements at Maximum Security and a separate, legal argument relative to the impact of such changes on the Court's August, 1977 Order. Because the factual allegations asserted compliance with the August 10, 1977 Order, I directed the Special Master to hold hearings and provide me with findings of fact and recommendations relative to the defendants' factual representations. Depending on the Special Master's findings, I would consider the defendants' legal argument that any improvements constituted "changed circumstances" in the totality of conditions underlying my 1977 determination that the facility was unconstitutional.

As directed, the Special Master held hearings in August and submitted findings of fact and recommendations in September. The parties were given until mid-October to file objections to those findings and recommendations. Essentially, the Special Master reports that:

1. While there has been improvement of physical conditions in Maximum Security, no single section of the facility currently meets the same minimum standards of health and safety imposed by the Court's August 10, 1977 Order on all other facilities of the ACI intended for permanent use; and

2. Programming in Maximum Security continues to be inadequate and out of compliance with provisions of the August 10, 1977 Order.

These findings were not disputed by the defendants who have

characterized the Special Master's conclusions as "fair and objective." Physical conditions and programming were central elements in the Court's 1977 finding that Maximum Security was unconstitutional; living conditions and idleness were the focal points of the Court's opinion condemning conditions in the old facility. Thus, the defendants have failed to establish the factual basis for their motion, namely, compliance with the pertinent provisions of the August 10, 1977 Order. In fact, the uncontroverted findings of the Special Master indicate that in the two vital areas of physical conditions and programming there are substantial shortcomings. Therefore, the defendants having failed to establish a factual basis for their motion, the Court need not discuss the legal questions inherent therein. Accordingly, the Court rejects the defendants' motion for reversal of its 1977 declaration that Maximum Security is unconstitutional.

This ruling can give rise to problems of infinite complexity. Indeed, were the Court to insist on immediate and full obedience to its order, the correctional system of the State of Rhode Island would be thrown into complete chaos as it scrambled to find places of confinement for the some 170 maximum security inmates who cannot be housed in Supermax. The Court has ordered Maximum Security to be closed; the occupation of Supermax is at hand. The defendants have neither devised nor offered an acceptable plan for closing Maximum Security and apparently are confident that this Court will not step in and order them to close the facility down forthwith. The plaintiffs have a right to the legal remedy prescribed by this Court over three years ago and can well argue that by not effecting its order the Court is remaining hostage to the defendants' inability to

plan and perform.

The maintenance of the integrity of the judicial system cannot countenance the disobedience of its orders absent compelling justification. The Court reluctantly concludes that this case falls within that extremely narrow category of cases where noncompliance must be tolerated at least for the moment. The situation at hand requires pragmatic consideration of the consequences that will flow from an inflexible judicial attitude. The Court's insistence on an immediate closing of the facility could force the transfer to other state and federal correctional systems of some 100 to 150 Rhode Island inmates. Even if other systems were willing to absorb these prisoners, a doubtful prospect given the serious overcrowding of correctional facilities nationwide, the result would be serious and counterproductive disruption of the transferred prisoners' family and community ties. Nor, for obvious reasons, is the Court about to order the State of Rhode Island to release large numbers of maximum security inmates from the ACI.

Fortunately, there is a barely discernible path out of this thicket of difficulties. While no portion of the old Maximum Security facility presently meets minimum standards of health and safety, the defendants, with appropriations totaling $451,000 provided by the State Legislature in its 1979 supplemental budget, now are in the process of initiating repairs that will bring Cellblocks G-H-I and J-K-L (BCU) substantially closer to compliance with minimum physical standards of health and safety by mid-1981. The defendants will be able to provide these cellblocks with

hot water and adequate plumbing and lighting, as well as some improvements in ventilation and the elimination of most fire safety deficiencies. By the reckoning of the defendants' own architectural engineers, however, these improvements will not ensure full compliance with minimum health and safety standards, which will require an additional estimated $560,000. Nonetheless, the cellblocks will be adequate for housing inmates in conditions meeting constitutional requirements for at least an additional three years after the completion of repairs or through 1984.

As for the second major deficiency, programming, the reduction of the population of the Maximum Security facility to the capacity of Cellblocks G-H-I and J-K-L (BCU) will eliminate program problems, so long as those work and educational opportunities now available in Maximum Security are left behind when inmates are transferred to the new institutions. While current programming is totally inadequate for the 260 to 270 sentenced offenders now residing in Maximum Security, they would be more than sufficient for a reduced population of approximately 120 inmates.

Thus, the two areas of most glaring deficiency vis-a-vis the August 10, 1977 Order, physical conditions and idleness, would be addressed in the retention of only Cellblocks G-H-I and J-K-L (BCU) after July, 1981. Moreover, the 126 cells in G-H-I and J-K-L (BCU), when combined with the 96 cells of Supermax, would give the defendants a capacity to house up to 226 maximum security prisoners. With some tightening of classification, the winnowing out of Maximum Security of medium security inmates who have thus far been allowed to remain there despite their lower custody level

and with a few occasional transfers, the defendants should be in a position to deal effectively with the entire current sentenced population of maximum security offenders through the end of 1984.*

To be sure this is a temporary expedient that simply postpones the defendants' underlying need to develop long-range solutions to their population difficulties. But it does provide the defendants with sufficient time to plan for the future and develop resources without the immediate crisis of total loss of the present Maximum Security. If the defendants decide to expend the funds required to bring Cellblocks G-H-I and J-K-L (BCU) into full compliance with minimum standards of health and safety, there is no reason why they should not be permitted to retain those areas in use permanently. On the other hand, they may wish to renew their efforts to expand Supermax, although that would appear to be a far more costly option. Whichever approach they elect, they win hereby some breathing space within which to plan and work.

By electing to renovate and save Cellblocks G-H-I and J-K-L (BCU) alone, the defendants have foreclosed the use of other areas. It is clear from the Special Master's report, as well as from pertinent depositions filed with the Court over the past two years in this case, that some portions of Maximum Security are in a serious state of disrepair and even structural decay. The defendants have conceded that the cost of rehabilitating

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*Again, we are dealing here only with sentenced inmates classified at the maximum security level of custody; pretrial detainees and offenders undergoing admission and orientation will be housed in the Intake Services Center in 1981.

Cellblocks A-B-C, D-E-F and P-Q-R would be enormous; they have never even suggested their renovation and rescue to the Court. It is clear that these portions of Maximum Security must be closed. When the new Intake Services Center becomes available to house the pretrial detainees currently residing in Maximum Security, an event now scheduled for the Spring of 1981 but unlikely to occur realistically before July, 1981, the defendants must discontinue completely and permanently their use of these cellblock areas. Neither the pressures of population nor arguments of convenience will excuse deviation from this schedule. Cellblocks A-B-C, D-E-F and P-Q-R are to be closed forever for further housing of prisoners at the ACI after occupation of the Intake Services Center; the use of these areas thereafter will result in the levy of immediate and automatic sanctions against the defendants.

In his findings of fact and recommendations, the Special Master indicated that one last residential area of the present Maximum Security facility, Cellblock M-N-O with its 78 cells, might be capable of renovation and rescue. To date, however, the defendants have neither plans nor resources to carry out such a rescue. Since the defendants have seen fit to do nothing to evaluate or analyze this possibility, the Court is not prepared to be particularly flexible. If the defendants wish to retain use of Cellblock M-N-O beyond the opening of the Intake Services Center in July, 1981, it must submit within 30 days of this order a detailed plan for interim or permanent upgrading of physical conditions therein. The plan also must include specific provisions for expansion of work opportunities for the total of some 190-200 offenders that potentially could be confined in Cellblocks G-H-I, J-K-L (BCU) and M-N-O. The preliminary estimates of the defendants' architectural consultants indicate

that full renovation of Cellblock M-N-O will require expenditures of approximately $590,000. Defendants additionally must have in hand the funds to conduct either interim or full repair of Cellblock M-N-O by July, 1981, if it intends to retain the cellblock in use. Unless such funds are allocated by mid-1981, this Court will require the immediate and permanent closing of the cellblock. Should the defendants procure sufficient funds to conduct interim repairs of M-N-O Cellblock and expand work programs in Maximum Security, they will be permitted to keep it open through 1984; should they procure enough to complete renovation and bring the cellblock into full compliance with minimum health and safety standards, they may use the cellblock permanently.

It is not without grave misgivings and some reluctance that the Court adopts this way out of the present predicament. It does so partly because there has been considerable amelioration of overall living conditions at Maximum Security despite continuing physical and programming deficiencies. The Special Master has reported consistently that the abhorrent sanitation situation in Maximum Security of 1977 has been reversed dramatically; that considerable, though limited, physical improvements, such as the repair and renovation of broken windows, railings, screens, ceiling tiles, some shower areas and ventilation, have occurred; and that staff and prisoner relations and morale have improved markedly. Moreover, the appropriations for undertaking interim physical repair of Cellblocks G-H-I and J-K-L (BCU) are no longer merely figments of the defendants' imagination; they have already been allocated by the Legislature

and are currently available to the defendants. Engineering work on the repairs is complete and bids for contractors to perform the work are about to be solicited. The repairs to be carried out with these appropriations, moreover, have been identified by an independent sanitarian from the U. S. Department of Public Health brought in by the Court in mid-1979, so the Court has reasonable assurance that they will address adequately real deficiencies. Thus, the prospects for Cellblocks G-H-I and J-K-L (BCU) meeting most of the physical requirements of the August 10, 1977 Order by mid-1981 are excellent.

Throughout the long history of this case there has always been confusion about the Court's role in remedying the unconstitutionality it found in 1977, a confusion perhaps deepened by the Court's appointment of a Special Master to oversee implementation of its complex order. It has never been the function of either the Special Master or the Court to operate or administer the Rhode Island Department of Corrections. Rather, after finding that the State's correctional facilities imposed cruel and unusual punishment on prisoners, the Court directed the defendants to alleviate certain identified impermissible conditions expeditiously. The selection of operational means for bringing about change and eliminating impermissible conditions has always been in the hands of the defendants. Over the course of the past three years, when the defendants have moved more slowly than the Court believed necessary, it has not hesitated to use the threat of contempt to prod the defendants to faster action. That is a different matter. Where the defendants have chosen alternatives that

the Special Master and the Court viewed as counterproductive or rejected options that we thought meritorious, the Court has carefully avoided imposing our solutions. Both directly and through its Special Master, the Court has offered criticism, condemnation, encouragement and suggestions; it has often said what the defendants cannot do; it has frequently interpreted the requirements of various professional standards; but it has never told the defendants what they must do operationally to meet the court's requirements.

I must note that while the Court has persistently reminded the defendants of its order requiring them to close Maximum Security, it has never ordered the defendants to carry out specific measures, such as transfers, new construction or relocation in particular institutions, to effectuate the order. The Court has criticized what it saw as overclassification, but has never required that specific percentages of the ACI population be at any specific level of custody; it has suggested alternatives to new construction, but never forbidden the state to go ahead with such construction; it has discouraged renovation of the existing facility as economically unfeasible, but has not prohibited the defendants from undertaking such renovation. The State, from the beginning, has had complete control over its own means for achieving Court-mandated objectives.

And that is the way it must be under our form of government. In this case the principles of both federalism and the separation of powers require the Court to monitor results not dictate means. So long as the defendants bring their correctional facilities into compliance with constitutional requirements, which the orders in this case reflect, this

Court will not and cannot intervene in the operations of the Rhode Island Department of Corrections. Executive agencies under a court order are free to conform in any fashion they choose, no matter how foolish or costly the mode of compliance may seem to the courts. Thus, while this Court has suggested different approaches to the defendants for meeting its orders, it has carefully refrained from imposing specific solutions on the defendants.

But time is running out for the defendants. While John Moran has proven adept at reshaping a system hovering on the brink of chaos into a controlled and professional one, he has been unable to chart a stable, future course. Well over three years have passed since the opinion in Palmigiano was entered; John Moran has been in Rhode Island almost three years now and the Court still does not have a firm draw-down plan. The defendants can no longer plead ignorance of what the Court will allow, for that is now plain. Cellblocks A-B-C, D-E-F and P-Q-R must be closed down permanently in July, 1981; Cellblocks M-N-O also must be closed down permanently unless the defendants provide a plan for its retention within 30 days of this order and have money in hand to complete at least interim repairs by July 31, 1981; Cellblocks G-H-I and J-K-L (BCU) must be closed down by December 31, 1984 unless it has been brought into compliance with minimum health and safety standards. The Court will entertain no further excuses for failing to meet these deadlines.

It is also time to wind down the special mastership. The purpose for my appointment of a Special Master was to ensure that the provisions

of the August 10, 1977 Order were carried out. The extent to which that has been accomplished is as much a tribute to the services of the Special Master as it is to the defendants' efforts, and the list of accomplishments is substantial: a dramatic change in leadership in the Rhode Island Department of Corrections; the separation of pretrial detainees from sentenced offenders; interim physical improvements of Maximum Security; programming improvement in Medium Security through erection of the Butler Building; acquisition and renovation of the "B" Building for minimum security inmates; a detoxification program; a residential drug treatment unit; expanded counseling services, particularly in the area of substance abuse; improved medical care; reduction of the protective custody inmates; an improved classification process with at least semiannual review; expanded education and avocational programs; over $800,000 worth of repairs and renovation in Medium and Minimum Security; improved mental health programs; an appropriation of $451,000 to upgrade physical conditions in Cellblocks G-H-I and J-K-L (BCU).

In addition, the Special Master has served as an ombudsman in the Rhode Island correctional system, a role reluctantly assumed because of the long and continuing absence of an effective administrative grievance process. In the course of this task, the Special Master has responded to literally thousands of letters and personal requests over the past three years. He has also undertaken frequent prison-related assignments from me, including involvement in the development of a legal library at the ACI, the negotiation of an end to the lock-downs that have occurred during the past three years and the investigation of cases brought to my attention by importuning prisoners. He successfully mediated the renegotiation of

the Rhode Island Training School for Youth consent decree which was finally entered in February, 1979. He has produced dozens of reports, each of which has been fair, accurate, balanced and exceptionally well-written. Finally, he has been an unfailing source of wise and moderate counsel and advice to me as I have wrestled with the many, complex prison-related issues coming before me over the past three years.

When I recruited J. Michael Keating, Jr. to come to Rhode Island to serve as Special Master, I promised him the job would last no more than a year. Without complaint he has served full or part-time for over 27 months. I must let him get on with his life, but I view his departure with a profound sense of professional and personal loss. I have come to admire and trust his intelligence, candor, sense of humor, articulateness, dedication and integrity. I am delighted that he intends to remain in Rhode Island to practice law.

I have directed the Special Master to wind up the affairs of his office during the next 60 days, using as much time as he requires to complete that task. As of January 15, 1981, the Office of the Special Master shall cease to function on a regular basis. I will, however, request that Mr. Keating review pending matters in the suit and report his findings to me quarterly at least through 1981. At the end of that year, the Court will consider the need to continue these quarterly reports. In addition, throughout 1981 I will continue to call upon Mr. Keating to conduct specific investigations relative to matters in the Palmigiano suit as needed from time to time. The Court, of course, will retain jurisdiction

over the case so long as unfulfilled deadlines, the latest of which is now December 31, 1984, remain.

I hope this is the last major opinion in the Palmigiano case. There is no reason why the schedule outlined here for a reduction of the use of Maximum Security cannot be accomplished. Only if the State abandons firmly and completely its past pattern of delay on this issue, however, is that wish likely to be fulfilled.

Chief Judge

November 17, 1980