J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

April 20, 1976
BKL:js

Brian K. Landsberg
Chief, Appellate Section

United States of America v. Commissioner of Adult Services No. 76-1160 (8th Cir.) (formerly, Tyler, et al. and United States v. Percich) (St. Louis City Jail)

As we discussed last week, the following describe a conflict that has arisen between our Division and the Bureau of Prisons with respect to some of the issues we propose to raise in the above-captioned appeal. The Solicitor General Memorandum and BOP's response to it (Memo, Cripe to Gilinsky) are attached. Protective notice of appeal has been filed, and our brief is due May 25, 1976. The Solicitor General's office has deferred ruling on our request to authorize an appeal pending our efforts to resolve the conflict with BOP.

Summary of Problem

We propose to appeal from an order of the district court (E.D. Mo., December 29, 1975) denying our motions for further relief against the Warden, etc. of the St. Louis City Jail. Three issues are presented: (1) transfer of St. Louis City Jail inmates to inferior and sometimes distant facilities; (2) inadequate visiting privileges and, (3) inadequate recreation at the St. Louis Jail. The Bureau of Prisons has no problems with the transfer issue. However, BOP objects strongly to our (proposed) position regarding visits and recreation.

144-42-937

The St. Louis City Jail now affords inmates three booth visits per week, one "contact" visit once every 4-5 weeks, a maximum of 90 minutes a week of outdoor recreation, and a maximum of 70 minutes per week of indoor recreation. We propose to argue that pre-trial detainees are entitled to more unless the defendants can sustain a heavy burden of proof that security considerations render liberalization

cc: Records — Chrono — File
Dunbaugh — Queen — Landsberg
Eisenstein

impossible. We would maintain that defendants have done no more than assert, in conclusory terms, that the current plans are the best they can manage with existing resources, and that this is not adequate justification for offering such meager opportunity for physical exercise and human contact. We believe that the position we propose to take is firmly supported by the case law which holds that pre-trial detainees may only be confined in the least restrictive conditions necessary to assure their appearance at trial. (See S.G. Memo, pp. 10-12).

BOP takes the position that we should not be asking a court to hold the St. Louis Jail to a standard higher than the standards now in effect at 90% of the jails with which it (BOP) has contracts for the housing of federal detainees. It is not clear whether BOP expects to be sued for housing detainees in substandard conditions in contract jails, or if BOP is simply concerned that it may come under pressure not to use such jails. (All federal detainees have been removed from the St. Louis Jail). It is clear that BOP is concerned about a pending suit, Wolfish v. Levi, (75 Div. 6000 (MEF), S.D. N.Y., filed 1/26/76) by inmates of a federal detention facility in New York.

If the allegations of the Wolfish petition are true (they are denied), inmates of the Metropolitan Correction Center in New York have about the same recreational opportunities as the St. Louis detainees but slightly fewer visiting hours. (It appears from the allegations, however, that all visits are contact visits).

Considerations

We acknowledge that conditions at the St. Louis City Jail which originally prompted our participation in the case have largely been remedied. It is doubtful that we would have entered the case, initially, to litigate about marginal improvements in visiting and recreation. We are also aware that the doctrine of the "least restrictive alternative" is open-ended, offering no certain stopping place. Unless we develop a rationale for a stopping place the doctrine would ultimately seem to require Holiday Inn type accommodations for all pre-trial detainees, without regard to

fiscal considerations. We have thus far been unable to rationalize such a stopping place. On the other hand, the district court denied our motions for further relief without having made any findings of fact or setting forth any conclusions of law. The visits and recreation afforded seem plainly inadequate. Moreover, it does not seem proper to drop these issues because pursuing them may lead to a decision threatening to the status quo. We are persuaded that our basic approach is correct, but informal discussions with BOP suggest they will not agree that the "least restrictive alternative" is the appropriate legal standard.

Some Alternatives

1. We could argue to the S.G. that our proposed appeal does not really affect BOP. BOP has never been held liable for conditions in contract jails, and the New York facility subject to suit houses mainly convicts, not pre-trial detainees, and therefore would be judged by a different standard.

2. We could reduce our proposed issues and ask only that contact visits be increased; this position would be based on what appear to be BOP standards for its prisons (though not for contract jails).

3. We could drop the issues of visiting and recreation in this appeal.

4. (Other) (please advise).