DLN:WWB:dlm
DJ 168-29-2
T. 7-3-72

JUL 5 1972

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Appeal in United States v. Wyandotte County, Kansas, et al. (D. Kansas, No. KC-3163)

RECOMMENDATION

I recommend that the United States file an appeal in this case.

STATUS

This suit was filed on June 5, 1970, pursuant to Title III of the Civil Rights Act of 1964, 42 U.S.C. 2000b to enforce the Fourteenth Amendment and the contractual rights of the United States as established by a federal prisoner maintenance contract between the defendants and the Bureau of Prisons. Trial was held in the United States District Court for the District of Kansas, and on May 9, 1972, the Court filed a Memorandum Opinion and Order which denied all relief requested by the United States and dismissed the case on the merits. Time for filing a Notice of Appeal expires July 10, 1972.

7/5/72 Jcf DN JT 7/5/72

QUESTION PRESENTED

Whether the District Court erred in holding that a general fear of possible violence resulting from racial integration of prisoners justifies continued maintenance of segregated jail facilities.

cc: ~~Records~~ Dunbaugh
Chrono Queen
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## STATEMENT

The Wyandotte County jail is a public facility, within the meaning of Title III of the Civil Rights Act of 1964 serving the county comprising Kansas City, Kansas and the surrounding area. The jail, which has an inmate capacity of 148, has an average inmate population of 87. Most of the inmates in the jail are pre-trial detainees. The rest are convicted misdemeanants serving sentences ranging from 30 days to one year.

The two main living areas of the Wyandotte County jail which house approximately one-half of the inmates are segregated on the basis of race. One area is populated entirely by whites; the other by blacks. Other smaller sections of the jail were not shown to be segregated. Assignment of inmates to the segregated sections of the jail are made by the warden.

The reason given for making racial assignments is that officials fear violence would result if prisoners were not kept separate by race. The warden testified that fights in the jail arise for a variety of reasons, including racial animus, but he could not recall any specific incidents of racially inspired fights. The warden admitted that fights do not occur on account of racial animus more frequently than they do for other reasons.

## DISCUSSION

1. The district court found that prisoners were segregated on the basis of race, 1/ but held that there was no violation of the Equal Protection Clause of the Fourteenth Amendment because the defendants had acted "in good faith, and with common sense, in properly taking into account racial tensions." 2/

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1/ Slip Opinion, pp. 9-10.

2/ Ibid, p. 19.

The Court's decision is clearly erroneous. In Lee v. Washington, 390 U.S. 333 (1968), the Supreme Court held racial segregation in prisons and jails to be unconstitutional. 3/ The reason put forth by the defendants to justify segregation is their belief that integration would result in violence. Such fear of interracial violence cannot justify state action which enforces racial segregation. Watson v. City of Memphis, 373 U.S. 526, 535-536 (1963); Cooper v. Aaron, 358 U.S. 1, 16 (1968); Buchman v. Warley, 245 U.S. 60, 81 (1971).

In a concurring opinion in Lee v. Washington, supra, three Justices suggested that certain "particularized circumstances" might justify racial segregation for a limited period of time. 4/ In the instant case, however, no evidence was presented of any "particularized circumstances" to justify the continued and general policy of racial segregation shown. There was only the general fear that violence would erupt if blacks and whites were housed together.

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3/ The court below attempted to distinguish the facts in Lee v. Washington by stating that there the segregated practices were expressed in a state statute. The Fourteenth Amendment allows no such distinction. See, McClelland v. Sigler, 327 F. Supp. 829 (D. Neb. 1971) aff'd 456 F. 2d 1266 (C.A. 8, 1972); see also Lombard v. Louisiana, 373 U.S. 267 (1963).

4/ 390 U.S. at 334. Examples of such circumstances might include drunk tanks (see the district court opinion in Lee v. Washington, 263 F. Supp. 327, 331 (M.D. Ala. 1966) and treatment of prior combatants in race riots (see Wilson v. Kelley, 294 F. Supp. 1005, 1009, n. 5 (N.D. Ga. 1968), aff'd 393 U.S. 266).

The argument that prison security justifies a policy of racial segregation was recently rejected by the Eighth Circuit Court of Appeals. In McClelland v. Sigler, 456 F. 2d 1266 (8th Cir. 1972) the Court answered the claim of prison officials that complete integration would result in violence:

> We think it is incumbent upon the officials in charge to make other provisions for housing those who would commit assaults or aggravations on other inmates, white or black, and thus only penalize those guilty of offending the personal and constitutional right of others. McClelland v. Sigler, supra at 1267.

2. In addition to evidence of racial segregation, we also presented evidence in the district court that due to a lack of sufficient jail staff, the use of inmates in supervisory functions, and the failure to adequately supervise the inmates, numerous abuses, including beatings, homosexual attacks, and kangaroo courts, occur within the jail. Although we asserted that such abuses constituted cruel and unusual punishment, we have concluded that the evidence in this regard is not sufficient to warrant appeal. There is no evidence that these abuses occurred other than infrequently, or were materially different from those typically occurring in other county jails. 5/ Accordingly, this case is not a good vehicle for establishing favorable principles on Eighth Amendment issues.

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5/ Slip opinion, p. 21.

Pursuant to a contract between Wyandotte County and the Federal Bureau of Prisons, federal prisoners are housed in the Wyandotte County jail. This contract provides, in relevant part, that racial discrimination is prohibited; that such prisoners shall be kept in safe custody; that the jail officials shall maintain proper discipline and control; that such prisoners shall not be subjected to cruel or inhumane treatment; and that they shall not be subjected to control or abuse by kangaroo courts. There is no reason to predicate an appeal on the existence of a contract with BOP, since alleged contract violations are also constitutional violations, and we desire the principles of law in this area to apply to all jails whether under federal contract or not.

## CONCLUSION

For the foregoing reasons, I recommend that appeal in this case be authorized on the issue of racial segregation of jail facilities.

DAVID L. NORMAN
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Civil Rights Division