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SAN FRANCISCO SHERIFF'S DEPARTMENT
and SAN FRANCISCO COUNTY SHERIFF MICHAEL HENNESSEY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARY BULL, JONAH ZERN, LISA GIAMPAOLI, MARCY CORNEAU, ALEXIS BRONSON, MICKY MANGOSING, CHARLI JOHNSON, LEIGH FLEMING, LAURA TIMBROOK, and all others similarly situated,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO SHERIFF'S DEPARTMENT, SAN FRANCISCO COUNTY SHERIFF MICHAEL HENNESSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND SAN FRANCISCO COUNTY SHERIFF'S DEPUTIES DOES 1 THROUGH 150,

Defendants.

Case No. C03-1840 CRB

DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: April 9, 2004
Time: 10:00 a.m.
Place: Courtroom 8, 19th Fl.
Judge: Hon. Charles R. Breyer

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INTRODUCTION

Plaintiffs' Motion for Preliminary Injunction asks this Court to engage in a meaningless exercise. Plaintiffs seek to enjoin polices that are no longer in effect. On January 21, 2004, the Sheriff enacted new search and safety cell policies that supercede the policies challenged by plaintiffs in their complaint. Plaintiffs were informed weeks in advance that the Sheriff intended to enact new policies. They declined the opportunity to review the new policies before they were promulgated and instead rushed to file their preliminary injunction motion on the very day the new policies took effect. Then, even though they had over a month to file an amended motion for preliminary injunction that could have been heard on April 8 and would have addressed the new policies, they did nothing. A fair inference is that plaintiffs have no objection to the new search and safety cell policies and concede that they comply with federal and state law.

Plaintiffs may have tactical reasons for doggedly continuing to pursue their motion for preliminary injunction. But the motion is not reasonably directed toward protecting them from future harm. Plaintiffs are not currently in custody in the San Francisco jails and, if at some point one of them is rearrested, she or he will be subject to the new search and safety cell policies. Plaintiffs' motion therefore should be denied. It is moot and plaintiffs cannot show any threat of irreparable injury. Plaintiffs also cannot demonstrate a likelihood of success on the merits. The new search and safety cell policies comply with the law and plaintiffs do not challenge the new policies. Finally, plaintiffs' proposed expansions of the policies are simply an effort to substitute their personal, and unsupported, policy preferences for the Sheriff's discretionary judgment. But the Sheriff, not plaintiffs, is authorized by law to set policy in the jails.

STATEMENT OF FACTS

I. THE SHERIFF HAS ABANDONED THE OLD POLICIES GOVERNING SEARCHES AND THE USE OF SAFETY CELLS AND ENACTED NEW POLLICIES THAT MOOT THE ISSUES RAISED IN PLAINTIFFS' COMPLAINT

On January 21, 2004, Sheriff Hennessey issued revised polices governing "Searches" (*See* Exhibit A to the Declaration of Sheriff Hennessey ("Hennessey Decl.") and "Safety Cell

Use" (*See* Exhibit B to the Hennessey Decl.). These new policies supersede and replace the old policies on the same subjects. (*See* Hennessey Decl., ¶¶1-4.)

The new Search and Safety Cell policies were the result of many weeks of work by the Sheriff and his staff. (Declaration of Undersheriff Jan Dempsey ("Dempsey Decl."), ¶4-19.) Plaintiffs' counsel was informed in writing on January 7, 9 and 16, 2004, and orally in mid-December 2003, at least four weeks before the new policies were issued, that the Sheriff intended to issue new policies that would address plaintiffs' concerns. (*See* Exhibits J, K and L to the Declaration of Ingrid Evans ("Evans Decl."), ¶2.) Plaintiffs' counsel was offered an opportunity to review the policies prior to enactment. (*Id.*) Counsel declined to take advantage of this opportunity. (*Id.*, ¶3.) Instead, they rushed to file this motion on the very day that they knew the Sheriff would be issuing the new policies. (*Id.)*

The following is a summary of the relevant sections of the new "Searches" and "Safety Cell Use" policies:

A. The New Search Policy

A. Prior to Intake/Booking

1. A prisoner may be strip searched prior to booking only if:

a. There is reasonable suspicion and supervisor approval on the Strip Search Authorization Form prior to the search; or

b. Supervisor approval is not required if the prisoner:

1. Is charged with a crime of drugs (except when arrested for violation of Health and Safety Code 11550 only), weapons and/or violence; or

2. Has been convicted or arrested within the last 5 years for drugs, (except when arrested for violation of Health and Safety Code 11550 only), weapons and/or violence, as documented in the criminal history information system.

3. Is charged under California Penal Code Section 3056 or booked with a State Parole Hold; or

4. Is charged under California Penal Code Section 1203.2; or

5. Is in the custody of another agency and is booked into the jail for safekeeping, including a prisoner booked on a U.S. Marshall hold.

B. At Intake/Booking

1. Prisoners may be strip searched at the time of booking only if:

a. There is articulable reasonable suspicion and supervisor approval on the Strip Search Authorization Form prior to the search; or

b. The prisoner is:

1. Is charged with a crime of drugs (except when arrested for violation of Health and Safety Code 11550 only), weapons and/or violence; or

2. Has been convicted or arrested within the last 5 years for drugs (except when arrested for violation of Health and Safety Code 11550 only), weapons and/or violence, as documented in the criminal history information system; or

3. Is charged under California Penal Code Section 3056 or booked with a State Parole hold; or

4. Is charged under California Penal Code Section 1203.2; or

5. Is in the custody of another agency and is booked into the jail for safekeeping, including a prisoner booked on a U.S. Marshall hold.

After intake and booking and before sentencing, the new policy permits strip searches only if: (1) there is reasonable suspicion; (2) the inmate was initially eligible for strip search at intake and there is a legitimate reason (such as a security search of the inmates housing unit) to conduct another search; (3) the inmate has been found to possess contraband during a prior search; or (4) the inmate is returning from a work detail, a court-ordered pass, a hospital visit, court appearance, or has had contact visits. There is no longer a policy of strip searching all detainees who are classified, dressed in orange jail clothes, and transferred from intake to a housing facility in the San Francisco County Jail system.

B. The New Safety Cell Policy

The "General" portion of the new Safety Cell policy limits the use of safety cells to specific situations:

B. Safety cells may be used only under the following circumstances:

1. When a prisoner is physically combative or otherwise presents an imminent danger to others.

2. When a prisoner is a danger to self, as determined by actions or words, including, but not limited to, physical or mental impairment to the point of falling down, banging his/her head against the wall, making suicidal gestures or threatening to commit suicide.

C. The safety cell shall not be used for prisoners who only refuse to be strip-searched or refuse other orders and do not otherwise meet the criteria for safety cell placement above.

D. Only Jail Psychiatric Services may determine a prisoner to be gravely disabled.

E. In no case shall the safety cell be used for punishment or as a substitute for treatment.

The new policy for searching inmates who are to be placed is safety cells, or taking their clothing, states, in relevant part:

F. The reason for the safety cell placement will determine whether the prisoner is stripped of clothing.

1. In safety cell placements that result because the prisoner is a danger to self or at his/her request, the prisoner will be required to remove all clothing and a strip search will be conducted to ensure the prisoner does not have contraband that poses a threat to his/her safety. The prisoner will immediately be given a safety cell garment and/or safety cell blanket.

2. In safety cell placements that result because a prisoner is a danger to others, the prisoner will be pat searched before being placed in the safety cell. Clothing will not be removed nor will a strip search be conducted unless the supervisor approving the placement can articulate reasonable suspicion that the prisoner has contraband hidden that poses a risk to prisoners, staff, or self.

II. THE NEW POLICIES REFLECT CAREFUL AND APPROPRIATE BALANCE BETWEEN THE RIGHTS OF PRISONERS AND THE SECURITY NEEDS OF THE JAILS

The new policies are the product of an extensive review of the former policies and are intended to better address the balance between institutional security and current legal

developments. (*See* Dempsey Decl., ¶8.) Setting policies for the county jails is a complex task that requires the expertise and experience of persons knowledgeable about jail administration and the specific needs of the San Francisco County jails as well as the current state of the law. (*Id.*) Both the old and new policies balance concerns with protecting the individual rights of the inmates with the critical need to prevent the introduction of drugs, weapons, and other contraband into the jail. (*Id*., ¶¶8-10.)

Drugs and weapons are regularly found on inmates during routine strip searches. (*See Id.,* 11-12 and Exhibits 3 and 4 to Dempsey Decl.) The new search policy provides more restrictive authority to search inmates and will lead to a higher incidence of illegal contraband in the jails. (*See* Dempsey Decl., ¶12.) Therefore, in order to implement the new policy, Undersheriff Dempsey was required to participate in lengthy meet and confer sessions with the Deputy Sheriff's Association[1] to obtain its acceptance of the new policy. (*Id.*) The DSA is concerned about the safety issues involved in the new policy. Their concerns are not speculative and are documented in the summary of four years of contraband recovered by the Sheriff's K-9 dog unit. (*See Id*., and Exhibit 7 to Dempsey Decl.)

In addition to the problem of contraband in the jails, the new safety cell policy was also discussed with the DSA. The Department maintains safety cells in the county jails for the temporary housing of inmates who pose a risk of harm to themselves or others. (*Id.*. ¶ 14.) These are small locked rooms that have built-in toilets and are otherwise without furnishings. (*Id.*)

Under the old safety cell policy, all inmates placed in a safety cell had their clothing removed for safety purposes. (*See* Exhibit 3 to Dempsey Decl.) The new policy allows inmates that are determined to be a danger to others to keep their clothing. However, inmates that are determined to be a danger to themselves will have their clothing removed. (*See* Exhibit 2 to Hennessey Decl.) As a safety precaution it is very important that clothing be taken from persons placed in a safety cell because they are deemed to be a danger to self. (*See* Dempsey Decl., ¶17.)

[1] The DSA represents approximately 850 members who have a vested interest in the safety and security of the jail environment.

The reason for this is that suicidal inmates can and do use their clothing to attempt to kill themselves. (*See Id.* and Exhibit 6 to Dempsey Decl.) Undersheriff Dempsey provided four examples in her declaration to demonstrate the need to remove an inmate's clothing who is placed in a safety cell. In summary, inmates in safety cells have used their underwear to attempt to hang themselves, used feminine hygiene products to attempt to kill themselves, and have hidden sharp objects and drug paraphernalia in their underwear. (*See Id.*).

III. IMPLEMENTATION OF THE NEW POLICIES

Sheriff Hennessey states under oath that he has abandoned the old search and safety cell policies and has no intention of reverting to the old policies. (*See* Hennessey Decl., ¶¶ 1-4 and Dempsey Decl., ¶¶ 4-25.) There are very significant costs and burdens associated with creating and implementing a new policy and ensuring that the deputies receive training in the new policy. (Dempsey Decl., ¶4-19.) It is very time-consuming to review the old policies and draft proposed changes. (*Id.*, ¶ 8.) As Undersheriff Dempsey explained in her declaration and as discussed above, drafts of the policies were circulated widely to jail supervisory staff and were the subject of numerous meetings and meet and confer sessions. (*Id.*, ¶ 8.) There is also a very significant expenditure of time to train the supervisory and line staff. (*Id.*, ¶¶ 18-19.) At the Sheriff's direction, Undersheriff Dempsey ensured that 122 supervisors received three hours of training[2] on the new search and safety cell housing policies on January 27 and 29, 2004. (*Id.*) Roughly 450 deputy sheriffs received daily training notification on these same policies for approximately eight days. (*Id.*) As a follow-up to instructional training, on February 13, a summary of the search and safety cell use policy revisions as a reference guide for all personnel. (*See Id.* and Exhibit 7 to Dempsey Decl.) In addition, a directive that summarized the new policies was also issued on December 24, 2003, before the new policies were finalized, in order to implement the policies before the holiday season. (*See* Dempsey Decl., ¶ 9 and Exh. 8 to Dempsey Decl.) The

[2] The training of supervisors included a three-hour instruction block conducted by the Custody Division Chief. The Chief went through the new policies line by line and the session included time for questions and answers. (*See* Dempsey Decl., ¶¶18-19)

fact that the Sheriff undertook this very significant effort confirms his commitment to permanently abandon the old policies.

LEGAL ARGUMENT

I. PLAINTIFFS FAIL TO MEET THE TWO REQUISITES FOR PRELIMINARY INJUNCTIVE RELIEF

A party seeking preliminary injunction relief must show it is entitled to this extraordinary remedy. *Matthews v. National Collegiate Athletic Association*, 79 F.Supp.2d 1199, 1202-03 (E.D. WA 1999). Plaintiffs are not entitled to an injunction unless they demonstrate: (1) the combination of probable success on the merits and the possibility of irreparable injury; or (2) the existence of serious questions regarding the merits and the balance of hardships tip sharply in their favor. *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) The court must "identify the harms which a preliminary injunction might cause to defendants and…weigh these against plaintiff's threatened injury." *L.A. Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). Plaintiffs cannot meet their burden.

A. Plaintiffs Have Not and Cannot Show Irreparable Injury

Plaintiffs have failed to show that they will suffer irreparable injury. Sheriff Hennessey has changed the policies about which plaintiffs complain. Plaintiffs cannot be irreparably injured by conduct that is no longer occurring. Moreover, none of the plaintiffs are currently in the custody of the San Francisco Sheriff's Department. Even if plaintiffs are taken into custody in the future, they will be subject to the Sheriff's *new* policies, policies that are not at issue in this motion and that plaintiffs have not challenged.

1. Plaintiffs Cannot Show Irreparable Injury Because The Sheriff Has Abandoned The Policies Challenged By Plaintiffs.

Where a plaintiff seeks an injunction against the allegedly indifferent actions of prison officials despite developments that postdate the pleadings, "the defendants may rely on such developments to establish that the inmate is not entitled to an injunction." *Farmer v. Brennan*, 511 U.S. 825, 846 (1994). Similarly, the Prison Litigation Reform Act (18 U.S.C. § 3626(b)(3)) does not provide for relief beyond that "necessary to correct the violation of the Federal right of

a particular plaintiff or plaintiffs." The Ninth Circuit also recognizes that a change in statute, ordinance or policy will moot a plaintiff's claim for relief. *Soranno v. Clark County*, 345 F.3d 1117, 1119 (9th Cir. 2003) (claim moot because county amended ordinance at issue); *Doty v. County of Las*sen, 37 F.3d 540, 544 (9th Cir. 1994) (injunction improper where county was no longer using challenged jail); *see also Tyler v. Black*, 865 F.2d 181, 183 (8th Cir. 1989) (en banc) (issue of double-bunking of inmates moot where practice was ended after the lower court trial and before the rehearing en banc). Additionally, in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 600-601 (2001), the Supreme Court dismissed Petitioner's class action was mooted by a change in objectionable statutory requirements during the pendency of the case. *See also McClelland v. Gronwaldt*, 155 F.3d 507, 514 (5th Cir. 1998) ("it is axiomatic that 'a request for injunctive relief remains live only so long as there is some present harm left to enjoin'").

Plaintiffs argue that the Court should not consider the changes in policy because the changes were made during the current litigation. These voluntary changes, however, cannot simply be ignored. The voluntary cessation of allegedly illegal conduct, whether or not in response to a lawsuit, renders a controversy moot. *White v. Lee,* 227 F.3 1214, 1243 (9th Cir. 2000); s*ee also Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 854 (9th Cir. 1985) (good faith change in conditions of prison library facilities made after lawsuit began rendered issues moot); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (self-corrective action taken in a genuine effort to comply with current case law provides foundation for dismissal based on mootness); *McCrary v. Poythress*, 638 F.2d 1308, 1310 (5th Cir.), cert. denied, 454 U.S. 865 (1981) (defendants' abandonment of prior purportedly unauthorized conduct rendered case moot).

The issue is not <u>when</u> or <u>why</u> defendants changed their policies. The issue is whether the change is permanent and whether the challenged conduct will recur. *White,* 227 F.3d at 1243. In *White*, the Ninth Circuit held that a memorandum that changed the way HUD did investigations was permanent and therefore mooted plaintiff's claims. The fact that plaintiff's lawsuit was the catalyst for the change was irrelevant. *Id*. at 1243. Plaintiffs rely on *Friends of*

the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc., 528 U.S. 167 (2000), but that case is clearly distinguishable. In that case, the Supreme Court addressed whether a government agency's moratorium would moot an otherwise valid claim for injunctive relief. It held that a moratorium, "by its terms was not permanent" and therefore did not moot a claim for injunctive relief. *Id*. at 709. The facts of this case are similar to those in *White*, not *Friends of the Earth*. The Sheriff has not simply suspended the application of the challenged policies. He rescinded them entirely, unequivocally stated that he has no intention of reverting to the old policies, and incurred considerable time and expense to implement the new policies. (Hennessey Decl., ¶¶ 2-4; *see also* Dempsey Decl., ¶¶ 4-25.) There is no realistic possibility that the challenged conduct will recur. This permanent change in policy is precisely the type of change that was at issue in *White* and defeats plaintiffs' motion for injunction.

2. Plaintiffs Lack Standing To Seek Injunctive Relief Because They Face No Imminent Harm.

In lawsuits to force governmental compliance, plaintiffs bear the burden of establishing standing. *Friends of the Earth*, 528 U.S. at 190. Named plaintiffs asserting claims on behalf of a class must have either personally sustained or be in an immediate danger of sustaining a direct injury as a result of the challenged statute or official conduct. *O'Shea v. Littleton*, 414 U.S. 488, 494 and 497 (1974) (injunctive relief would not be granted for future harm that resided on speculation and conjecture that the plaintiffs may repeat the actions which resulted in the harm). A plaintiff seeking injunctive relief must show he is "'immediately in danger of sustaining some direct injury' as [a] result" of the challenged conduct. *McConnell v. FEC*, 124 S.Ct. 619, 708 (2003) (quoting *Los Angeles v. Lyons*, 461 US 95, 102 (1983)); *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975); *Booth v. Churner*, 532 U. S. 731, 735 (2001). Most important, while a plaintiff may have a claim for damages based on the injury he already sustained, that plaintiff cannot obtain injunctive relief absent a showing of any real or immediate threat that the plaintiff will be wronged again. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Here, the present harm is not only speculative but it also cannot be applied to plaintiffs, as they are not currently incarcerated. The plaintiffs here may proceed with their individual

claims for damages but, as *Lyons* held, they are not entitled to injunctive relief. *See Smith v. Montgomery County*, 573 F. Supp. 604, 608-09 (D.Md. 1983) (dissolving preliminary injunction prohibiting strip searches because class representative unlikely to be detained again).

Named Plaintiff Mary Bull's threat to commit future acts of unlawful civil disobedience cannot create standing to seek injunctive relief. Even if arrested again, she and the other named plaintiffs will not be subject to the policies that existed at the time of their initial arrests and that gave rise to this lawsuit. Plaintiff Mary Bull's vague claims that she plans to participate in non-specific, "future" protests in San Francisco do not meet the requirement of proving that it is sufficiently likely that she will be re-arrested. (Bull Declaration, ¶¶ 19-20.) As such, Plaintiff's "some day" plans to participate in additional protests in San Francisco are speculative, and do not meet the standards required for injunctive relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) ("some day" intentions did not meet the actual or imminent requirements for injunctive relief).

B. Plaintiffs' Request Also Fails Because They Cannot Demonstrate a Likelihood of Success on the Merits.

Plaintiffs' motion independently fails because they are not likely to prevail on the merits. The Sheriff's new policies comply with state and federal law. Moreover, plaintiffs do not limit their injunction to the requirements of applicable law. Rather, plaintiffs also seek to impose *additional* obligations on the Sheriff that are unsupported by either the law or by expert opinion and that impermissibly tread on the Sheriff's discretion to set the policies in the jails.

1. Plaintiffs Have Not Challenged the New Policies

The Sheriff enacted his new policies on January 21, 2004. Plaintiffs had more than a month, until February 28, to file an amended motion for preliminary injunction that would be heard on April 9 and that addressed the new search and safety cell policies. Plaintiffs did not file such a motion. A fair inference is that plaintiffs have no objections to the new policies and that they concede that the policies comport with federal and state law.

2. The Sheriff's New Policies Comply With Federal and State Law.

Defendants have separately moved for a declaration that the new search and safety policies comply with federal and state law. The discussion below (sections 2.3 through 3)[3] repeats the arguments in support of that motion, as the lawfulness of the new policies independently defeats plaintiffs' motion for preliminary injunction.

Defendants cannot be held liable for violations of the fourteenth amendment absent a showing that they were deliberately indifferent to the rights of inmates. *Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc), *cert. denied*. 502 U.S. 1074, 112 S.Ct. 972 (1992); *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1979 (1994). This is a high standard -- plaintiffs must show that defendants were "so wanton or reckless with respect to the 'unjustified infliction of harm,'" so as to have knowingly and willfully allowed the harm to occur. *Redman v. County of San Diego*, 942 F.2d at 1443. Because inmates are in the Jail for relatively short periods of time while awaiting trial and sentencing, the constitutional requirements are less stringent than if it were a long-term facility. *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980); *see Hutto v. Finney*, 437 U.S. 678, 686, 98 S.Ct. 2565, 2572 (1978).

a. The New Search Policy Is Valid Under Federal and State Law.

Conditions for pre-trial detainees in the jail satisfy the Fourteenth Amendment unless they are intended as punishment. *Bell v. Wolfish*, 441 U.S. 520, 535. If a particular condition is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." *Id.* at 539. As the Supreme Court explained, "the effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." *Id.* at 540.

[3] Sections 4 & 5 separately responds to the factual arguments plaintiffs make in support of their motion.

In determining whether a particular condition constitutes "punishment," the Court must accord "wide-ranging deference" to jail administrators and their expert judgment. *Id.* at 547. "[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548 (citations omitted). Consistent with this deference, the Court has provided broad discretion to law enforcement agencies in determining the security needs of penal institutions. *See Bell,* 441 U.S. 520. The *Bell* Court found that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners *and pretrial detainees*." 441 U.S. at 546 (emphasis added). To determine the Fourth Amendment reasonableness of an institution's search policy, the Court balanced the need for the particular search against the attendant invasion of personal privacy. *Id.* at 559. The Court found that a blanket strip search policy in which pre-trial detainees were subjected to visual cavity searches after *every* contact visit with a person from outside the institution, *even in the absence of suspicion that an individual inmate had received contraband from a visitor*, was reasonable as "a detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.*

Since *Bell*, the Ninth Circuit has consistently held that the nature of the arrestee's offense and his or her prior arrest record are critical to determining whether a strip search is constitutionally permissible. In *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), the Court held that, prior to a strip search of minor offenders, jail authorities must possess "reasonable suspicion that the individual arrestee is carrying or concealing contraband." The Court further held that this "reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *Id*. at 617. In *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989), the Court once again declared that the nature of the crime was critical in determining whether a strip search was permissible. There the Court found that grand theft auto was sufficiently related to violence to justify a strip search prior to housing the plaintiff with other inmates. *Id*. at 1447. In considering the City of Los Angeles'

strip search policies, the Ninth Circuit in *Kennedy v. Los Angeles Police Department*, 901 F.2d. 702 (9th Cir. 1990), reiterated the reasonable suspicion standard for strip searches, noting that it "prudently invites the consideration of the nature of the crime charged in determining the constitutionality of an individual search" and emphasizing the holding in *Giles* that reasonable suspicion "may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." *Id*. at 716.

Giles, Thompson and *Kennedy* are consistent with out-of-circuit authority permitting strip searches of persons charged with violent crimes. Following *Bell v. Wolfish,* the Sixth Circuit upheld the constitutionality of a strip search of an arrestee charged with felonious assault because it is a "class of crime of which violence is an element" and noted that the search was further justified by the fact that the inmate "would ultimately come into contact with the general jail population." *Dufrin v. Spreen,* 712 F.2d 1084, 1087 (6th Cir. 1983). Similarly, that Court held that county jail officials had a legitimate security interest in strip searching an arrestee charged with "misdemeanor menacing" because that is a violent crime involving a person who "intentionally places another person in reasonable apprehension of imminent physical injury." Further, menacing is associated with weapons and may well raise reasonable suspicion on part of jail officials that someone arrested on that charge may be concealing weapons or other contraband. *Dobrowolsky v. Jefferson County*, 823 F.2d 955, 958-59 (6th Cir. 1987).

Consistent with the controlling Ninth Circuit cases of *Giles*, *Thompson*, and *Kennedy*, the current search policy permits strip searches of detainees upon a finding of reasonable suspicion or when they have been arrested within the past five years for crimes involving drugs, weapons or violence.

Under these cases the new search policy is valid. The search policy enacted on January 21, 2004, allows strip searches to be conducted only for inmates charged with drugs, weapons or violence, with a criminal history of drugs, weapons or violence, on active parole or probation, being held at the behest of another agency or where there is documented reasonable suspicion that contraband may be present.

In addition, the Sheriff's Department policy permits strip searches of inmates arrested for violation of parole (Penal Code section 3056) and probation (Penal Code section 1203.2). These prisoners have, by definition, already been arraigned, convicted and sentenced and are being returned to jail because they have violated the conditions of their release. Several factors make strip searches of these prisoners constitutional. Probation and parole violators are ineligible for citation and release, release on their own recognizance, or bail. They know that they are facing more likely and longer periods of incarceration and therefore would have a greater incentive to attempt to introduce contraband into the jail. *Giles,* 746 F.2d at 617 (noting that the strip search policy in *Wolfish* was justified in part because inmates were "detained for substantial pretrial periods").

Further, parolee and probationers must agree as a condition of release to submit to certain law enforcement searches. They therefore have a diminished expectation of privacy. They are also "more likely than the ordinary citizen to violate the law." *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 590 (2001). The reasonableness of a search under the Fourth Amendment is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed to promote legitimate governmental interests. An arrestee's "status as a probationer subject to a search condition informs both sides of that balance." *Id.*, 122 S. Ct. at 588. Such convicted and sentenced prisoners who have violated their conditions of release may permissibly be strip searched when they are returned to jail, just as other inmates who are returning from outside the facility.

The Sheriff's Department policy permits a strip search of inmates after intake only with reasonable suspicion or in three narrowly defined circumstances. In most cases, reasonable suspicion and a supervisor's prior approval is required. But a pre-sentenced inmate may also be strip searched without reasonable suspicion: (1) during a security search, but *only* if that prisoner met the requirement for being strip searched at intake; (2) if the prisoner has been found with contraband during prior searches; or (3) is returning from a work detail, court ordered pass, a hospital appointment, court appearance, contact visits, interviews, or other activities outside their

assigned housing unit. A security search for contraband is one that is focused on one part or area of the jail (e.g., a cell, a dormitory or a pod). *See* Search Policy II.C.2.a.

These searches are permissible based on the security needs of the prison. Deterrence of smuggling requires the ability to conduct security searches of housing units – either on a random basis or on the basis of information that weapons or drugs have been secreted in a particular cell or area of the jail. (See Exhibits 6,7 and 10 to Dempsey Decl., ¶¶ 4-22.) Pre-sentenced prisoners will only be subject to a strip search during a security search if they were eligible for a strip search at intake – i.e., they were arrested for or had a history of drugs, weapons or violence offenses. Jail officials also need to deter known smugglers of contraband – i.e., those who have previously been found with drugs or weapons – with the ability to conduct a search in the absence of reasonable suspicion. Finally, as stated above, *Bell v. Wolfish* permits searches of pre-trial detainees following their contacts with outsiders, as when returning from work details or hospital visits.

b. The New Search Policy Comports With California Law.

California Penal Code § 4030 provides additional state-law guidance regarding strip searches of detainees held for infraction or misdemeanor offenses before being placed in the general jail population. Before a prisoner is classified and transferred to a housing unit, section 4030(f) allows the Sheriff's Department to strip search misdemeanor and infraction arrestees only when reasonable suspicion exists that the inmate is concealing a weapon or contraband *or* when the detainee was arrested for a crime involving drugs, weapons or violence. The Sheriff's Department's revised strip search policy complies with Section 4030 because it does not provide for intake strip searches under any other circumstances. [4]

[4] Plaintiff's reliance on the holding of a Massachusetts district court case is unpersuasive. The facts in *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass 2000) refer to a blanket strip search policy where "**every single** female pre-arraignment detainee was required to be strip-searched" *regardless if the crime was for a felony or misdemeanor*. *Id.* at 17 (emphasis added). The old policy adopted August 20, 1999 which is at controversy, did not rise to this level of a "blanket policy", and represented the Defendant's good faith efforts to comply with the legal requirements known to the Department at that time. (*See* Dempsey Decl., ¶¶ 4-12). In addition, the San Francisco Sheriff's Department abandoned this policy on January 21, 2004. (*See* Hennessey Decl.,¶¶ 1-4).

3. The New Safety Cell Policy Satisfies Federal and State Law.

Safety cells are used to confine inmates who pose a danger to themselves or others. As the Ninth Circuit noted, "[p]rison officials have to have some means of controlling violent or self-destructive inmates temporarily until the episode passes … it is difficult to distinguish between violent, mentally healthy inmates and violent, mentally disturbed ones." *Anderson v. County of Kern*, 45 F.3d at 1310, 1315 (9th Cir. 1995). Accordingly, although Sheriff's Department staff rely on the assistance of medical and psychiatric professionals in evaluating safety cell placements, the state regulatory law grants the Sheriff the authority to determine when safety cell placements are necessary to control violent or self-destructive inmates. (*See* Dempsey Decl., ¶¶13-17, 20-25).

The Department's revised safety cell policy also complies with Section 1055 of Title 15 of the California Code of Regulations, entitled "Use of Safety Cell," which permits the use of a safety cell for inmates who destroy property or who pose a danger to themselves or others. Cal. Code Regs. Title 15, § 1055 (2003). Section 1055 sets forth specific guiding principles that jails must follow, but leaves the development of specific written policies governing safety cell use to jail administrators.[5] Not only does the Sheriff's Department's current safety cell policy comply with the restrictions set forth in section 1055, but it restricts the use of safety cells in the San Francisco County Jails more than state law mandates.

With the exception of when a prisoner *requests* a safety cell placement or Jail Health Services recommends such placement, the Sheriff's Department's safety cell policy allows the safety cell to be used only when an inmate imminently threatens to cause physical injury to himself or others. Although Section 1055 allows the safety cell to be used to hold those inmates who display behavior which results in the destruction of property, current San Francisco policy is more limited. It only allows the safety cell to be used for behavior resulting in property destruction that could result in harm to the inmate or another. In conformance with Section

[5] "The facility administrator, in cooperation with the responsible physician, shall develop written policies and procedures governing safety cell use and may delegate authority to place an inmate in a safety cell to a physician." Cal. Code Regs. Title. 15, § 1055 (2003).

1055, the revised policy does not allow the safety cell to be used for punishment or as a substitute for treatment.

The Sheriff's Department's policy to strip search a detainee entering a safety cell who is a danger *to himself* in order to find dangerous contraband is not only consistent with Section 1055, but is supported by relevant case law. Federal law demonstrates the need for jail administrators to ensure the safety of the inmate as well as others in the jail. To be sure, cases abound in which jail officials have been sued for failing to prevent detainees from harming themselves when in custody. *Sibley v. Lemaire*, 184 F.3d 481, 483-86 (5th Cir. 1999) (plaintiff sued institution for failure to take actions to prevent plaintiff from suffering psychotic episode and injuring himself by removing his eyeballs); *Yellow Horse v. Pennington County*, 225 F.3d 923, 925-26 (8th Cir. 2000) (plaintiff's estate sued jail for failure to prevent suicide of decedent after he was taken off suicide watch); *Frake v. City of Chicago*, 210 F.3d 779, 780-81 (7th Cir. 2000) (plaintiff filed a lawsuit against defendant city after his son, a pretrial detainee in defendant's detention facility, hung himself in his cell). In view of this case law, the Sheriff's Department's current safety cell policy allows limited strip searches, but only out of the need to prevent an inmate from inflicting harm upon himself.[6]

The current safety cell policy further requires that: (1) a prisoner shall be placed in a safety cell only with the approval of the facility commander, the facility watch commander, or the designated physician (Section I.A.); (2) staff must observe an inmate at least twice every thirty minutes and document this observation (Section III.C.1-3); (3) a medical assessment must be provided within thirty minutes after placement (although Section 1055 only requires that this be done within twelve hours) (Section II.K); (4) a Watch Commander must review the inmate's retention in the housing cell every eight hours (Section IV.A); (5) medical and psychiatric clearance must be secured for continued retention within twenty-four hours of placement (Section IV.B&C); (6) necessary food and water be provided (Section III.D & E); (7) an inmate

[6] When an inmate poses an imminent threat *to others*, including staff, other inmates or civilians, he will be placed in the safety cell but will not be strip searched unless there is a reasonable suspicion that the prisoner has concealed contraband.

may not stay in the safety cell beyond twenty-four hours (although Section 1055 allows it, simply requiring medical clearance "for continued retention every twenty four hours" after the first medical assessment); (8) staff must maintain the safety cell's cleanliness and provide inmates with basic sanitary needs (Sections III.F & G and Section V); and (9) detainees who are placed in safety cells must be provided a safety cell garment and/or blanket immediately after placement (Section G.1-2).

These provisions demonstrate that the current safety cell policy fully complies with federal law and exceeds the requirements of state law set forth in Section 1055. In addition, because safety cells may not be used for punishment, the safety cell policy does not violate federal protections and fully complies with Title 15, Section 1083(d) (stating "In no case shall a safety cell, as specified in title 24, section 2- 470A.2.5, or any restraint device be used for disciplinary purposes").

a. Plaintiffs untimely effort to inject new claimants into this lawsuit must be rejected and the allegations of these new claimants cannot be considered in this motion.

After plaintiffs filed their motion for preliminary injunction and the court set the briefing schedule, plaintiffs belatedly sought to file a second amended complaint adding six new named plaintiffs and adding new Roe class plaintiffs with new and different factual allegations. The court has denied plaintiffs' request to hear their motion to file a second amended complaint on shortened time. Defendants obviously have had no opportunity to depose these new claimants or conduct other discovery related to their claims. Fairness dictates that the Court should not consider these new claimants or their allegations. Defendants hereby move to strike the declaration of Steve Noh, Michael Marron, and Michele De Ranleau.

b. Plaintiffs' factual arguments in support of their motion are misplaced – the Sheriff never had a policy of placing inmates in safety cells for punishment.

Neither the old policy nor the new one has ever authorized the placement of an inmate in a safety cell for punishment or to force someone to comply with a strip search. (*See* Dempsey Decl., ¶¶14-17, 20-25.) The new safety cell policy complies with the requirements set forth in Title 15 §1055 *et seq.* and is constitutional.

Plaintiffs misrepresent the deposition testimony of various witnesses to try and prove that the safety cell's are used for punishment, when in fact, refusing to consent to a strip search, standing alone, has never been an adequate or allowable reason for placement of an inmate in a safety cell. For instance, plaintiffs cite the deposition of Mitch Marquez and imply that he has seen inmates naked in a safety cell in violation of their rights. In actuality, Mr. Marquez testified that it was his understanding that only persons that were suicidal were not allowed to retain their clothes and he has seen such (suicidal) persons naked in a safety cell. (Exh. A to Evans Decl. at page 31, lines 3-9, 11-18) Further, Undersheriff Dempsey testified that when she learned that there had been isolated instances in the past where prisoners were not given safety garments, she immediately reminded facility commanders at their next meeting that inmates were to be given safety cell garments in a timely manner and, in no event, longer than 30 minutes. (Exh. B to Evans Decl. at page 73, lines 17-23, page 74, lines 13-20). [7]

Lastly, the report prepared by Prison Legal Services analyzed all complaints that were made about the jail, regardless of whether or not they were true. While the report did state that on occasion persons had been placed in a safety cell for refusing to cooperate in a strip search, it did not state that this was the sole basis for safety cell placement of any one individual. (Exh. D to Evans Decl. at page 26, lines 12-25.) Deputy Humphrey corroborated that it was neither the policy nor practice to place inmates in a safety cell based only on the fact that they refused to consent to be strip searched. (Exh. F to Evans Decl. at page 116, lines 10-15.) In fact, in the case of named plaintiff Mary Bull, she was placed in a safety cell because she was determined to be gravely disabled, appeared to be a danger to others, refused to be searched, became

[7] Plaintiffs also misrepresent the testimony of Jail Psychiatric Services counselors Cotton and Chow and Sheriff Deputies Carson, Palencia and Humphrey. Therapist Karen Cotton testified that in her opinion refusing to consent to a strip search could be considered "bizarre" behavior. (Exh. H to Evans Decl. at page 56, line 1 - page 57, line 10.) Deputy Carson explained the difference between a search for a safety cell placement and a strip search in her deposition. In no way did Deputy Carson's testimony indicate, as plaintiffs attempt to imply, that every person placed in a safety cell has refused to consent to a strip search. (Exh. C to Evans Decl. at page 17, lines 7- page 18, line 12). Deputy Palencia testified that the prior policy required the removal of inmates' clothing before placement in a safety cell. He did not testify that inmate's body cavities are inspected. (Exh. E to Evans Decl. at page 45, line 15 – 46, line 4).

argumentative, refused all orders, engaged in bizarre behavior, and was uncooperative during search (refused). (Exh. I to Evans Decl. (Safety Cell Housing Forms); and Exh. G to Evans Decl. at page 45, lines 12-25.)[8] Likewise, the other plaintiffs[9] that were placed in a safety cell were put there for proper reasons. Plaintiff Alexis Bronson was placed in a safety cell because he was deemed to be a danger to others and had swung his arms at one of the Sheriff deputies. (*See* Exhibit M to Evans Decl., ¶14.) Plaintiff Leigh Fleming was arrested for resisting arrest and disturbing the peace. Plaintiff Fleming was placed in a safety cell because she appeared to be a danger to others, for bizarre behavior that resulted in the destruction of property and she "was kicking and banging on door and window - refused to cooperate with ID processor." (*See* Exh. N to Evans Decl., ¶15.) Plaintiff Deborah Flick was arrested because she was extremely intoxicated and attempting to drive her car. Plaintiff Flick was placed in a safety cell because she was found to be gravely disabled and extremely intoxicated. (*See* Evans Decl., ¶19.) Plaintiff Miki Mangosing was arrested because she was extremely intoxicated, fighting with bar patrons, screaming and yelling. (*See* Evans Decl., ¶20.)

II. PLAINTIFFS' CANNOT SHOW THAT THEIR POLICY PREFERENCES SHOULD OVERRIDE THE SHERIFF'S LAWFUL EXERCISE OF DISCRETION.

In addition to seeking to enjoin the old, superseded search and safety cell policies, plaintiffs' proposed injunction seeks to go much farther and impose additional limitations on the Sheriff's use of safety cells. Specifically , plaintiffs ask this court to require that: (1) any safety

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[8] Steve Noh claims he was arrested and strip searched in County Jail 9 in San Francisco, San Francisco has no record of his arrest. Further, Steve Noh is not a named plaintiff in the lawsuit, has not been deposed and plaintiffs have not produced any documents or proof of his arrest. The court should not consider his declaration or the declarations of Michael Marron or Michele De Ranleau, neither of whom are currently named plaintiffs in this lawsuit and no discovery has been provided related to these individuals. This motion is the first time that defendants have heard mention of Steve Noh, Michael Marron, or Michele De Ranleau. Defendants object and move to strike their declarations, and ask the court not to consider them.

[9] Plaintiff Charli Johnson was arrested for outstanding warrants. There is no record of her being placed in a safety cell at the San Francisco County Jail. (See Evans Decl., ¶17.) Plaintiff Laura Timbrook was arrested for outstanding arrest warrants and charged with burglary, forgery and intent to defraud. There is no record of her being placed in a safety cell at the San Francisco County Jail. (*See* Evans Decl., ¶18.)

cell placements be made *only* by a "licensed professional;" (2) no inmates be strip searched before being placed in a safety cell; and (3) inmates be permitted to keep their clothing in the safety cell *unless* a "licensed professional" determines that the inmate is likely to use the clothing to harm him or herself. *See* Plaintiffs' Motion at 1.

There are two fatal problems with plaintiffs' expanded injunction. First, plaintiffs impermissibly seek to substitute their policy preferences for those of the Sheriff. The Supreme Court grants broad discretion to law enforcement agencies in addressing the security needs of penal institutions. *See Bell v. Wolfish*, 441 U.S. 520. The Prison Litigation Reform Act, also limits this Court's jurisdiction to grant injunctive relief:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of the criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A), (C). The Act specifically covers local detention facilities such as jails, including those that house pretrial detainees. 18 U.S.C. § 3626(g) (3), (5). It also applies specifically to class actions. 18 U.S.C. § 3626(a)(1). The Act limits the authority of the Court to involve itself in municipal decision-making functions regarding the Jail. *See also Doty v. County of Lassen*, 37 F.3d 540 (9th Cir. 1994), citing *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (federal court's role is limited to correcting constitutional violations; courts have no role in formulation of prison policy).

Together, these authorities require that this Court defer to the Sheriff in setting jail policy unless a policy clearly violates the law.

Second, plaintiffs utterly fail to demonstrate that their proposed changes to jail policy are necessary to correct unlawful practices. In fact, plaintiffs provide no legal or factual support at all for their position. For example, they cite to no authority for the proposition that safety cell placements should only be made at the direction of a "licensed professional" and state regulations are to the contrary. *See* California Code of Regulations Title 15, § 1055 (safety cell

placement may be approved by "the facility manager, watch commander *or* the designated physician") (emphasis added). They also cite to no expert opinion or other evidence that would tend to support their demand that all safety cell placements be made by a "licensed professional."[10] Likewise, they cite no legal or evidentiary support for their assertion that inmates should not be strip searched before being placed in safety cells or that they should be permitted to keep their clothing.

Plaintiffs' unsupported position is nothing more than a policy preference. They are in effect asking this court to substitute their personal preferences for the carefully crafted policies that the Sheriff has developed and implemented. This is exactly what *Bell* and the Prison Litigation Reform Act forbid. Even more important, plaintiffs' proposed new policies are ill-conceived and dangerous. As Undersheriff Dempsey explains in her unrefuted declaration, jails have safety cells in order to provide temporary housing for inmates who may harm themselves or others. (Dempsey Decl., ¶ 14.) It would expose inmates to unnecessary and inappropriate risk if they could not be placed into a safe environment until evaluated by a "licensed professional." (*Id.*, ¶ 22.) And the policies that govern the searching of inmates before they are placed in safety cells, and whether inmates can keep their clothing, are essential to protect the inmates and others. (*Id.*, ¶ 25.) The Sheriff's first duty is to protect the safety of the inmates and the deputies. (*Id.*, ¶ 4, 10.) Inmates who are bent on suicide must be carefully searched and monitored. Even innocuous articles such as a tampon have been used by inmates to try to harm themselves. (*Id.*, ¶ 17.) There is no room for error. Plaintiffs' proposed policy revisions may be well intentioned, but they could result in unnecessary and preventable death and injury.

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[10] Plaintiffs should not be permitted to introduce such evidence after the fact, in their reply, and any such evidence should be disregarded as untimely.

CONCLUSION

For each of these reasons, defendants request that the court deny Plaintiffs' Motion for Preliminary Injunction.

Dated: March 19, 2004

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