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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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MARY BULL, JONAH ZERN, and all others similarly situated,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

CASE NO: C 03-1840 CRB

PLAINTIFFS' OPPOSITION TO DEFENDANT SHERIFF MICHAEL HENNESSEY'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE: QUALIFIED IMMUNITY

DATE: August 30, 2005
TIME: 10:00 a.m.
CTRM: 8
JUDGE: Hon. Charles R. Breyer

COMPLAINT FILED: April 23, 2003
TRIAL DATE: Not Set

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INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants' motion for partial summary judgment argues that it was not clearly established in 2003 that it was unlawful to strip search minor offenders brought to the jail after their arrests and therefore the Sheriff is immune from liability for the blanket policies that required such strip searches. In ruling on the motion, the court faces an unusual situation. This is the rare case in which the law in question is not only clearly established, but has been *held* to be clearly established. In 1992, the Ninth Circuit observed, "At the time Appellees were searched, *it was clearly established in this circuit* that it was unlawful to search an arrestee *brought to the jail* on the charge of committing a minor offense unless the officer directing the search possesses 'a reasonable suspicion that the individual arrestee is carrying or concealing contraband'. *(Giles v. Ackerman,* 746 F.2d 614,617, (9th Cir. 1984) *cert denied,* 471 U.S. 1053…" *ACT UP!/Portland v. Bagley* 917 F.2d 298,301 (9th Cir. 1992) [emphasis added].)

According to defendants, Sheriff Hennessey is entitled to qualified immunity because he could not be reasonably expected to apply this holding. Ninth Circuit precedent is *inapplicable* because the San Francisco jail is different from other jails: they claim there is more smuggling activity in San Francisco, and more contraband has been found in the cells where prisoners await disposition of their cases or serve their sentences after conviction. Moreover, the defendants argue, the Ninth Circuit's holding is of limited scope: it extends only to the booking area of the jail where such minor offense arrestees are initially held – once these arrestees are moved out of this area, at the jail's sole discretion, into the housing area or into solitary "safety" cells, they no longer are protected from strip searches even though they could still bail out, even though they could be released on OR, or be released at or before arraignment[1] because the charges are dismissed. Moreover, the defendants contend that they could lawfully strip search arrestees who were brought

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[1] California Penal Code § 1270 provides the misdemeanants the right to OR release at arraignment "unless the court makes a finding on the record . . . that an own recognizance release will compromise public safety . . .." All the representative plaintiffs in this case were released before or at arraignment and most were never charged at all – clearly not a group properly subject to a blanket strip search.

to the jail on offenses which might or might not involve "violent" conduct, even if the arrestees were not otherwise suspicious.

In short, because of these limitations and distinctions, defendants take the position that the Sheriff was free to promulgate a policy that required the strip searching of *all* arrestees who were assigned to jail housing ("classified") before arraignment. He was also free to promulgate a policy of strip searching *all* persons who were placed in "safety" or solitary cells. The Sheriff further argues that the jail was free to strip search arrestees who are not otherwise suspicious on the basis of the charged offense alone -- even in those cases where "violence" was not an element of the offense, and the arrest could be effected without probable cause to believe a "violent" act had been committed.

The bulk of the evidence and the legal arguments which the Court will consider in deciding whether qualified immunity protects the Sheriff are already before the Court. Plaintiffs' motion for partial summary judgment details the strip-search policies which Plaintiffs assert violated class members' constitutional and statutory rights, and both the plaintiffs and defendants develop their respective views of the law.[2] In this cross motion, however, defendants counter attack with a dramatic rejection of all Ninth Circuit precedent, asserting, as noted above, it is distinguishable *on the facts* because the San Francisco is a big, busy jail full of drug addicts and (apparently) hardened criminals who are intent upon smuggling drugs and weapons into the jail any way they can, including the use of every imaginable body cavity.

This attempt to distinguish and limit Ninth Circuit law requires the court to consider the salient fact which brought the Ninth Circuit to rule that it is unlawful to strip search arrestees brought to the jail for minor offenses: namely, that in the prior cases, defendants were unable to show that minor offense arrestees posed a threat to jail security. As a class, there was no evidence they had a

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[2] The Sheriff's qualified immunity motion does not address or defend the following categories of individuals subject to a strip-search: (1) detainees convicted of a crime involving drugs, weapons or violence within the past five years or arrested on multiple occasions for such crimes during the same period; (2) detainees arrested for a probation violation; (3) detainees arrested based on federal charge; (4) detainees in transit from one part of the state to another; (5) detainees arrested outside of San Francisco pursuant to a San Francisco warrant; (6) detainees who "consented" to a strip search following initial booking; and (7) detainees who refused to consent to custodial searches and therefore were immediately classified for housing.

propensity to smuggle contraband into the jail after they were arrested. If the defendants can show that *this* factual circumstance was different in San Francisco, if there is an appreciable risk, a reasonably suspected danger here, *then* they may be able successfully to distinguish the prior cases and Sheriff Hennessey might be able to escape liability. The question for the court, then, is whether defendants have introduced *any* evidence to show that San Francisco, unlike other communities, is a place where minor offenders *do* pose a threat to the jail.

Defendants have provided no evidence that would allow the court to answer this question in the affirmative. There is no evidence that the San Francisco jail faced a situation any different from any other jail. Minor offenders do not pose a threat to the jail here, just as they do not pose a threat to jail security in other cities and towns.

In considering the question of qualified immunity, the Ninth Circuit has required a defendant to show that there is some *salient* fact that justifies the defendants' failure to apply clearly established law to the situation at hand. The situation need not be identical, for the obvious reason that this would mean that the very notion of "clearly established" law would disappear in a welter of case-specific circumstances. In *San Jose Charter of Hells Angels Motorcycle Club v. City of San* Jose, 402 F.3d 962, 974-975 (9th Cir. 2005), the court stated, "[Defendant] is not entitled to qualified immunity 'simply because there [is] no case on all fours prohibiting [this] particular manifestation of unconstitutional conduct.' There need not be prior authority dealing with this precise factual situation in order to deny [defendant] qualified immunity for his actions." *(See, e.g., Hope v. Pelzer,* 536 U.S. 730, 739 (2002).)

In the present case, defendants have failed to show that the San Francisco jail faced any risk from minor offender arrestees – including those charged with offenses that do not necessarily involve violence. Therefore, the Ninth Circuit's ruling that it is unlawful to conduct strip searches of arrestees before arraignment under blanket policies is fully applicable. Therefore, the Sheriff can be held responsible for failing to conform his policies to this clearly established law.

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ARGUMENT

I. INTRODUCTION

On April 4, 2005, in *San Jose Charter of Hells Angels Motorcycle Club v. City of San* Jose 402 F.3d 962 (9th Cir. 2005), the Ninth Circuit reiterated a court's inquiry in deciding whether an official is entitled to qualified immunity:

> The Supreme Court has set forth a two-pronged inquiry to resolve all qualified immunity claims. First, "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officers' conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201. Second, if so, was that right clearly established? *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case.

(402 F.3d at 971, quoting *Saucier v. Katz,* 533 U.S. 194, at 201, 202 (2001).) Accordingly, plaintiffs will set forth their argument in accordance with the parameters of this two pronged inquiry.

II. DEFENDANTS VIOLATED THE FOURTH AMENDMENT BY IMPLEMENTING BLANKET POLICIES FOR THE STRIP SEARCHING OF MINOR OFFENSE ARRESTEES BROUGHT TO THE JAIL BEFORE ARRAIGNMENT

A. Temporary Detainees – Those Arrested for Minor Offenses and Held at the Jail until Arraignment – Are Protected from Strip Searches under the Fourth Amendment

Courts addressing the constitutionality of strip searches begin their analyses with *Bell v. Wolfish* (1979) 441 U.S. 520. The Supreme Court considered the constitutionality of a strip search policy applied to pretrial detainees at the Metropolitan Correctional Center (MCC), a short term federally operated custodial facility in New York City. Plaintiff challenged the strip-searching of detainees *following their contact visits with persons from outside the facility*. (441 U.S. at 537.)

The Court tested the constitutionality of the strip searches against the Fourth Amendment proscription of unreasonable searches. While the practice of strip searching "instinctively [gave the Court] the most pause," (441 U.S. at 558), the Court "[b]alanc[ed] the significant and legitimate security interests of the institution against the privacy interests of the inmates, the Court concluded that the "visual body-cavity inspections as contemplated by the MCC rules" may be conducted *absent probable cause*. (441 U.S. at 560.)

1 In 1984, the Ninth Circuit decided *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984). Plaintiff
2 had been strip searched at a local Idaho jail following her arrest for a traffic violation. The parties
3 "[did] not dispute the nature of the intrusion. They agree that *Giles'* privacy was invaded in a
4 frightening and humiliating manner." (746 F.2d at 617.) Unequivocally holding that strip searches
5 of arrestees for minor offenses must be predicated on reasonable suspicion that the arrestee is
6 carrying contraband, the Court stated:

7 We hold that arrestees for minor offenses may be subjected to a strip
8 search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering
9 from a communicable disease. Because no such suspicion existed in Giles's case, the officer who searched Giles violated her rights under
10 the fourth amendment. . . .

11 We conclude, however, that strip searching of every arrestee booked into the Bonneville County Jail is not necessary to protect the
12 institution's security interest. Balancing that interest against the privacy interests of arrestees, we hold that arrestees charged with
13 minor offenses may be subjected to a strip search only if jail officials possess a reasonable suspicion that the individual arrestee is carrying
14 or concealing contraband. Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and
15 conduct, and the prior arrest record. (Emphasis added.)

16 (746 F.2d at 615, 617.) Rejecting the argument that those arrested for such offenses likely would
17 be carrying contraband, the court noted, "[A]rrest and confinement in the Bonneville County Jail are
18 unplanned events, so the policy could not possibly deter arrestees from carrying contraband." (746
19 F.2d at 617.)
20 *Giles* followed the Fourth Circuit decision in *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir.
21 1981) which held that a strip search which required county jail personnel to strip search an individual
22 arrested for drunk driving " 'conclusively' " violated the Fourth Amendment and " 'bore no such
23 discernible relationship to security needs at the Detention Center that, when balanced against the
24 ultimate invasion of personal rights involved, it could reasonably be thought justified.' " *(Giles*, 746
25 F.2d at 618.)
26 Most relevant to the Sheriff's qualified immunity plea, *Giles* explained that the placing of
27 "temporary detainees" in the general population did not justify the County's policy. (746 F.2d at
28 619.) As plaintiffs have pointed out in the reply filed in support of their motion for partial summary

1 judgment, "temporary detainees" are those who are 'arrested and held overnight or for another short
2 period before appearing before a judicial officer and those waiting to be released while a bond is
3 posted, a relative comes, or the like." (See, Reply Memorandum, pp.8-11; *Smith v. Montgomery,*
4 547 F.Supp.592, 593 (D.Md.1982), cited with approval by *Giles,* 746 F.2d at 617.) In other words,
5 the term "temporary detainees" refers to the arrestees who are in the class before the court in the
6 present case: arrestees who are held in the jail prior to arraignment.

7 The Ninth Circuit revisited the issue in *Ward v. San Diego County*, 791 F.2d 1329 (9th Cir.
8 1986). Following plaintiff's 1981 arrest for the misdemeanor offense of "failing to appear," plaintiff
9 was stripped and searched prior to a determination of whether she was eligible for an own
10 recognizance release. Rejecting the sheriff's claim of qualified immunity, the Ninth Circuit
11 concluded "that the law was sufficiently clear in early 1981 so as to expose a public official who
12 unreasonably authorized blanket strip searches of minor offense arrestees to civil liability under 42
13 U.S.C. § 1983." (791 F.2d at 1332.) The court relied on cases which held that the strip search of
14 an individual arrested on a misdemeanor traffic violation who was unable to post bond violated the
15 constitution where no reasonable suspicion existed the arrestee would possess a weapon or
16 contraband. *(Ward*, 791 F.2d at 1333.)

17 In *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1992), as noted above, the
18 Ninth Circuit recognized that by 1989 "it was clearly established in this circuit that it is unlawful to
19 strip search an arrestee brought to a jail facility on charges of committing a minor offense, unless the
20 officer directing the search possesses 'a reasonable suspicion that the individual arrestee is carrying
21 or concealing contraband.' "

22 *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) held that strip searches may
23 be constitutional where the crime for which the detainee has been arrested -- in *Thompson*, grand
24 theft auto -- provides the *individualized* reasonable suspicion necessary to justify the search. The
25 court, however, citing numerous decisions from sister circuits, reiterated that:

26 > [T]his court and several other courts have invalidated blanket visual strip search policies as applied to arrestees detained for minor traffic
27 > offenses and other misdemeanors not normally associated with
28 > weapons or other contraband. [Citations omitted] Courts invalidating strip search policies as applied to traffic and other non-violent

> offenders have generally held that in order to strip search such arrestees, the arresting officers must have reasonable individualized suspicion that an arrestee is carrying or concealing contraband. [Citations omitted] Individualized suspicion sufficient to warrant a strip search of such detainees may be based on such factors as "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record." [Citations omitted.] (Emphasis added.)

(885 F.2d at 1446.)

In language speaking directly to Sheriff Hennessey's motion, the court reiterated that the placing of a newly arrested detainee "into contact with the general jail population . . . by itself cannot justify a strip search," 885 F.2d at 1447, citing *Giles* (746 F.2d at 618) and *Masters v. Crouch*, 872 F.2d 1248, 1253, 1254-1255 (6th Cir. 1990), where the court stated "*the fact of intermingling alone has never been found to justify [a strip search of a minor offense arrestee] without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution"*. (885 F.2d at 1447 (emphasis added).)

Within a month after deciding *Thompson*, the Ninth Circuit delivered its opinion in *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1989), which held that classification of an offense as a felony, standing alone, did not justify a strip-search. A dispute between roommates had led to the arrest of one roommate for felony grand theft after her roommate accused her of stealing a television and other property which the officers values at more than $400.00, the threshold for grand theft. Following her arrest, Kennedy was a forced to submit to a body cavity search. (901 F.2d at 704.)

The Court placed a heavy burden on those defending blanket strip searches of all incoming suspected felons, emphasizing, at the outset, that "The intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities is dehumanizing and humiliating." (901 F.2d at 711.) The LAPD subjected all felony arrestees to a body-cavity search as a matter of course, whereas only those misdemeanor arrestees charged with offenses relating to narcotics or suspected of concealing contraband or weapons were forced to undergo such a search. (901 F.2d at 713.)

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1 The Ninth Circuit observed that "The enacted policy, if it is to be constitutional, must be
2 "reasonably related" to the penal institution's interest in maintaining security. A ham-handed
3 approach to policy making runs the serious risk of infringing upon detainees' constitutional rights.
4 (901 F.2d at 713 (Citations omitted).)

5 The court held that the Department's policy was unsupported by any "serious justification."
6 (901 F.2d at 716.) It held that while the nature of an offense may be a factor in determining the
7 existence of that reasonable suspicion sufficient to justify a strip search, the classification of
8 particular conduct as a felony rather than a misdemeanor did not, standing alone, justify a strip
9 search. (901 F.2d 716.)

10 The Ninth Circuit applied the foregoing precedents in *Fuller v. M.G. Jewelry*, 950 F.2d 1437
11 (9th Cir. 1991). Plaintiffs were arrested on suspicion of taking a ring valued at $800 from a jewelry
12 store. (950 F.2d at 1439-1440.) Officers conducted a field pat-down search of plaintiffs and
13 searched plaintiffs' purses, but found nothing. Plaintiffs were arrested on suspicion of grand theft
14 and, while detained, were subjected to two strip and visual body and cavity searches, one at the
15 central station and a second at the women's jail; neither search uncovered any crime. (950 F.2d at
16 1439, 1440.)

17 The court reiterated that classification of the alleged crime as a felony "is of no
18 consequence." (950 F.2d at 1446.) The court restated the rationale for its decisions in *Giles* and
19 *Kennedy:*

20 > The clearly-stated rationale underlying those decisions, which allow
21 > body cavity searches of prisoners and detainees on less than probable
> cause, is to protect prisons and jails from smuggled weapons, drugs
22 > or other contraband which pose a threat to the safety and security of
> penal institutions.
>
23 > These decisions suggest that strip and body cavity searches of
24 > detainees may be conducted based on reasonable suspicion only
> where such searches are necessary to protect the overriding security
25 > needs of the institution--that is, where officials have a reasonable
> suspicion that a particular detainee harbors weapons or dangerous
> contraband.

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27 (950 F.2d at 1447.)

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1 The Ninth Circuit reaffirmed its precedents in *Arpin v. Santa Clara Valley Transportation*
2 *Agency,* 261 F.3d 912, 922 (9th Cir. 2001) ("[S]trip searches of persons arrested for minor offenses
3 are prohibited by the Fourth Amendment, unless reasonable suspicion exists that the arrestee is
4 carrying or concealing contraband or suffering from a communicable disease.") District courts in
5 this circuit have followed the foregoing precedents. *(See, e.g., Adnan v. Santa Clara County Dept.*
6 *of Corrections* (2002 WL 32058464, (N.D.Cal. 2002) [Even if the searches are visual rather than
7 physical, the degree of intrusion is significant and does not appear to be justified by a legitimate
8 penological interest. Therefore, Plaintiff asserts a cognizable claim that the strip searches violated
9 his Fourth Amendment rights.].)

10 **B. Sheriff Hennessey Has Made No Showing That the Jail's Policy of Strip**
Searching Minor Offense Arrestees Is Justified by Security Concerns
11

12 Sheriff Hennessey states that he authorized the former strip-search policy to combat a major
13 safety problem arising from the smuggling of drugs and weapons into the jails. He relies primarily
14 on a declaration by Undersheriff Jan Dempsey which lists contraband found in jail cells from April
15 2000-December 2003 and on exhibits attached to the Declaration of Captain Ellen Brin. As
16 Plaintiffs have already pointed out in the reply filed in support of their own motion for partial
17 summary judgment, this "evidence" does not support the policies Plaintiffs challenge here.
18 The contraband Undersheriff Jan Dempsey lists in her declaration was uncovered during
19 searches in cells. No evidence exists that these cells housed individuals following their arrest for
20 offenses not involving weapons, drugs or violence; indeed, this contraband was discovered during
21 the period that defendants strip searched all arrestees who were placed in the "general population"
22 (which was itself segregated through the "classification" process on the basis of age, criminal
23 sophistication, prior record and the like). The Dempsey material makes no claim that deputies
24 discovered the catalogued contraband during strip searches of class members -- detainees arrested
25 for offenses not involving drugs, weapons or violence. The Brin declaration, to which Plaintiffs have
26 objected, provides no relevant information. Captain Brin fails to offer evidence that the contraband
27 she lists was uncovered during strip-searches of detainees arrested for offenses not involving drugs,
28 \\\

weapons or violence. Indeed, the exhibits do not list the charges for which the individuals were arrested.

Sheriff Hennessey's own testimony provides the coup de grace to his argument. Plaintiffs' counsel asked the Sheriff at his deposition if the Sheriff believed that "the incorporation into the general population in and of itself is sufficient reason to strip search all persons held prearraignment at the San Francisco Jail." Sheriff Hennessey answered, "No," although admitting that such was his policy prior to January 2004. (Deposition of Sheriff Michael Hennessey, at 83:10-19, Ex. 2 to the Declaration of Thom Seaton.)

Consistent with that belief, the Sheriff changed his policy in January 2004; no longer would classification for housing be an independent basis for strip-searching pre-arraignment detainees arrested for offenses not involving weapons, drugs or violence. Undersheriff Dempsey explains that "The new 'Searches' policy is intended to better address the balance between institutional safety and current legal developments." (Dempsey Declaration, ¶ 8.) She fails to state, however, to what *new* legal developments she refers. The law has been stable on the question of strip-searching minor offenders for twenty years or more. If the policies were changed because arrestees were finally taking the Sheriff to court to enforce their rights, this circumstance can hardly be cited in support of qualified immunity: rather, the change is an admission that the law was clearly established and the unlawful practices were indefensible and unnecessary as a security matter. (See, Federal Rule of Evidence 407; *Eng v. Skully,* 146 F.R.D. 74 (S.D.N.Y.1993) [Evidence of policy changes is admissible to prove feasibility of alternative measures or for impeachment purposes].)

C. All "Temporary Detainees" Brought to the Jail on Minor Offenses Are Protected Against Strip Search, Even If They Are Moved out of the Booking Area into the Housing Area of the Jail

In *Giles* and *Thompson*, the Ninth Circuit made clear that a policy of strip-searching minor offense arrestees before arraignment was not justified simply because some of these detainees were placed in housing with the general jail population. *Thompson's* language should have been quite clear to Sheriff Hennessey:

> Although Thompson, like the arrestees in *Dobrowolskyj* and *Dufrin,* was placed into contact with the general jail population, such a factor by itself cannot justify a strip search. *See Giles,* 746 F.2d at 618 (fact

> that arrestee may ultimately be intermingled with general jail population does not, by itself, justify strip search as such intermingling is "both limited and avoidable"); *Masters,* 872 F.2d at 1254-55 ("the fact of intermingling alone has never been found to justify [a strip search] without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution").

(885 F.2d 1439, 1447.) District courts in the Ninth Circuit recognized that this was controlling circuit precedent. *(Wong v. Beebe,* 2002 WL 31548486 (D. Or. 2002), (rev'd. on other grounds *Wong v. U.S.,* 373 F.3d 952, 957 (9th Cir. 2004) ["[W]ell before Wong's strip and cavity search [in 1999], it was clear that blanket strip search policies are unconstitutional if justified by nothing more than an arrest on suspicion of the commission of a felony or a planned confinement in the general jail population"]; *Silvia v. Clackamas County* 2001 WL 34039482, (D. Or. 2001) [Court found county's policy of strip-searching all arrestees housed in general jail population unconstitutional: "Well before Silvia's strip and cavity search, it was clear that blanket strip search policies justified by nothing more than arrest on suspicion of the commission of a felony or a planned confinement in the general jail population are unconstitutional," citing *Fuller*, *supra, Kennedy v. Los Angeles Police Department, supra,* and *Thompson, supra*].)

D. Temporary Detainees Placed in "Safety" Cells (Solitary Confinement) Are Protected from Strip Searches by the Fourth Amendment

Sheriff Hennessey seeks an exception from the Fourth Amendment which would allow the strip searching of all those placed in safety cells prior to arraignment.[3] However, placement in safety cells under the Sheriff's prior policy was not tied to a perception that the detainee possessed contraband such as weapons or drugs. The criteria for such placement were indefinable -- for example, placement could be made without medical authorization if a supervisor deemed that the arrestee displayed "bizarre behavior" or seemed "gravely disabled". Some of the criteria were

[3] Plaintiffs' papers supporting their motion for partial summary judgment address the unconstitutionality of this overbroad blanket policy. *See,* Plaintiffs Memorandum Of Points And Authorities In Support Of Partial Summary Judgment, at pp. 17-19; Plaintiffs' Reply To Defendants' Opposition To Plaintiffs' Motion For Partial Summary Judgment, pp. 14-16.

1 manifestly unrelated to the danger of smuggling – for example, arrestees could be placed in safety
2 cells at their own request. Some of the criteria were catchalls for a broad range of behavior – for
3 example, "danger to self/others" – a criteria so broad that the underlying behavior might or might
4 not be related to security of the person or the jail. In the case of Miki Mangosing, for example, an
5 arrestee brought in for "drunk in public" was classified as appropriate for safety cell placement
6 because she was so drunk she was "out of control". (See, plaintiff's reply in support of their motion
7 for summary judgment, ¶ 14.) Arrestees were placed in these cells *naked.*

8 These policies were unconstitutional because they did not require a scintilla of suspicion that
9 the arrestee, as an individual, posed a risk of smuggling contraband in a body cavity. By 1989, "it
10 was clearly established in this circuit that it is unlawful to strip search an arrestee brought to a jail
11 facility on charges of committing a minor offense, unless the officer directing the search possesses
12 'a reasonable suspicion that the *individual* arrestee is carrying or concealing contraband.' " *(Act*
13 *Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1992) [emphasis added]. *See, e.g., Fuller*
14 *v. M.G. Jewelry, supra,* 950 F.2d at 1437, 1447 ("[S]trip and body cavity searches of detainees may
15 be conducted based on reasonable suspicion only where such searches are necessary to protect the
16 overriding security needs of the institution--that is, where officials have a reasonable suspicion that
17 a *particular* detainee harbors weapons or dangerous contraband."[emphasis added]).) The Sheriff
18 does not argue that a reasonable suspicion existed that all individuals placed in safety cells posed a
19 risk of smuggling contraband, regardless of the arrest, the charge, the history and mental status.
20 Therefore he has failed to show the strip search on a blanket basis of all safety cell placements can
21 be justified under the *Bell v. Wolfish* balancing test and the Ninth Circuit cases that charge jails to
22 limit the strip search of minor offense arrestees to those instances where there is some security basis
23 of the search.

24 **E. Arrestees Brought to the Jail on Offenses Which Do Not Require Violent**
25 **Conduct as an Element of the Offense or as the Basis of the Arrest Are Protected by the Fourth Amendment from Strip Searches Without Individualized Suspicion**
26
27 Sheriff Hennessey contends that because Zern was arrested for resisting arrest causing serious
28 bodily injury to a police officer and Corneau was arrested for battery of a spouse or someone in a

dating relationship, charges which do not necessarily involve violence, their Fourth Amendment rights were not violated.[4] Yet the Ninth Circuit has limited the strip search of arrestees brought to the jail to those who have been arrested for charges which *involve violence* – and has cited cases which observe that the security justification for such searches is that these offenses "posed the very threat of violence by weapons…that… must [be curtailed] in prisons…" (*Fuller v. MG. Jewelry*, *supra*, 950 F.2d at 1447.) In this circuit, there is a clear limitation on *blanket* searches of arrestees charged with offenses which may not involve violence and a clear requirement for a security justification for any *blanket* search at the stage before arraignment. The Sheriff has failed to show any security justification for such blanket searches that would differentiate this case from the clear limitations imposed by the Ninth Circuit.

III. IT SHOULD HAVE BEEN CLEAR TO SHERIFF HENNESSEY THAT THE CHALLENGED POLICIES WERE UNLAWFUL AND THEREFORE HE IS NOT ENTITLED TO IMMUNITY FROM LIABILITY

A. Sheriff Hennessey Should Have Known, and in Fact, Did Know, That the Jail's Policies of Strip Searching Minor Offense Arrestees Before Arraignment, Simply Because They Were "Classified' for Jail Housing, Was Unlawful

Sheriff Hennessey seeks to avoid the effect of language in *Giles v. Ackerman, supra,* that explained that the placing of temporary detainees in the general population did not justify the County's policy.[5] *Giles* noted " '[d]efendants' heavy reliance on the intermingling of its temporary detainees with the general [jail] population is misplaced' because such intermingling is both limited and avoidable." (746 F.2d at 619.) Sheriff Hennessey takes great pains to note that *Giles* addressed the policy of the small Bonneville County Jail and not an urban facility --rife with smuggling -- which the Sheriff administers.

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[4] Plaintiffs' papers supporting their motion for partial summary judgment address the constitutionality of the strip-searches of these Plaintiffs. *See,* Plaintiffs Memorandum Of Points And Authorities In Support Of Partial Summary Judgment, at pp. 19-23; Plaintiffs' Reply To Defendants' Opposition To Plaintiffs' Motion For Partial Summary Judgment, pp. 12-13.

[5] The Sheriff protests Plaintiffs' use of the term, "blanket strip-search policy." This term simply refers to the uniform and indiscriminate strip searches of classes of people. Plaintiffs do not contend that deputies categorically strip searched other arrestees, including those arrested for drunkenness and those cited and released. Also, some, but not all, inmates able to post bail avoided strip search; this depended on whether they were coerced to sign consent forms (in which case they were strip searched upon booking) and the amount of time the jail, in its sole discretion, held them in the booking area (they might be able to post bail before being moved out into housing).

1 As noted above, and as the Ninth Circuit repeatedly has recognized, however, a defendant
2 " 'is not entitled to qualified immunity "simply because there [is] no case on all fours prohibiting
3 [this] particular manifestation of unconstitutional conduct.' " There need not be prior authority
4 dealing with this precise factual situation in order to deny [defendant] qualified immunity for his
5 actions. *(San Jose Charter of Hells Angels Motorcycle Club v. City of San* Jose, *supra,* 402 F.3d at
6 974-975; quoting *Headwaters Forest Def. v. County of Humboldt,* 276 F.3d 1125, 1131 (9th Cir.
7 2002), 9th Cir, 2002) and *Deorle v. Rutherford,* 272 F.3d 1272, 1274-75 (9th Cir.2001). *See, also*
8 *Hope v. Pelzer,* 536 U.S. 730, 739 (2002); *Kennedy v. City of Ridgefield* (9th Cir. 2005) 411 F.3d
9 1134, 1144 ("Thus, the alleged conduct need not explicitly have been previously deemed
10 unconstitutional, but existing case law must make it clear that the conduct violated constitutional
11 norms."); *see, e.g., Sissoko v. Rocha* 412 F.3d 1021, 1041 (9th Cir. 2005) *("*[f]or a constitutional right
12 to be clearly established, its contours 'must be sufficiently clear that a reasonable official would
13 understand that what he is doing violates that right. This is not to say that an official action is
14 protected by qualified immunity unless the very action in question has previously been held
15 unlawful; but it is to say that in the light of preexisting law the unlawfulness must be apparent.'");
16 *Kennedy v. City of Ridgefield*, 411 F.3d 1134, 1144 (9th Cir. 2005) ("Thus, the alleged conduct need
17 not explicitly have been previously deemed unconstitutional, but existing case law must make it clear
18 that the conduct violated constitutional norms."); *Moreno v. Baca* (2005) 400 F.3d 1152, 1167 ("It
19 is not necessary that the alleged acts have been previously held unconstitutional, as long as the
20 unlawfulness [of defendants' actions] was apparent in light of preexisting law. Closely analogous
21 preexisting case law is not required to show that a right was clearly established."); *Motley v. Parks,*
22 383 F.3d 1058, 1062-1063 (9th Cir. 2004) ("Although the inquiry into what is 'clearly established'
23 must be decided with reference to the specific situation the officers confronted, 'officials can still
24 be on notice that their conduct violates established law even in novel factual circumstances.'");
25 *Flores v. Morgan Hill Unified School Dist.,* 324 F.3d 1130, 1136-37 (9th Cir.2003) ("In order to find
26 that the law was clearly established ... we need not find a prior case with identical, or even 'materially
27 similar' facts."); *Deorle v. Rutherford* 272 F.3d 1272, 1275 (9th Cir. 2001) (Noting that if qualified
28 immunity existed only if the very action in question has previously been held unlawful, "officers

would escape responsibility for the most egregious forms of conduct simply because there was no case on all fours prohibiting that particular manifestation of unconstitutional conduct.").)

Moreover, *Giles* was followed by *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) which focused on policies of an urban jail system. Citing *Giles*, *Thompson* reiterated that the placing of a newly arrested detainee "into contact with the general jail population . . . by itself cannot justify a strip search." (885 F.2d at 1447.) Thus, even assuming that *Giles* was distinguishable to a jail administrator, *Thompson* provided fair warning that automatically strip-searching all detainees placed in housing with the general jail population, regardless of the crimes the detainees committed, violated the Fourth Amendment. [6]

Among the factors a court considers in determining a defendant's entitlement to qualified immunity is "information the searching officers possessed." *(Anderson v. Creighton*, 483 U.S. 635, 641 (1987). *See, e.g., Hammond v. Kunard,* 148 F.3d 692, 697 (7th Cir. 1998) (Because "Information possessed by an officer may be relevant to the inquiry . . . It is therefore appropriate for the court to look at what the defendants knew at the time of the alleged constitutional deprivation to see if they acted 'reasonably.'"); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873, (9th Cir. 1993) (Facts and circumstances within officer's knowledge considered); *Fuller v. M.G. Jewelry,* 950 F.2d 1437, 1443 (9th Cir. 1991) (Examine established law and information officer possessed).)

Here, the Sheriff's contention that he believed Fourth Amendment protection extended only to those arrestees who were held in the booking area while awaiting bail is not supported by the jail's actual practice. There was no special, defined "sanctuary" period during which arrestees were protected from strip search. Captain Arata's memorandum dated February 23, 2000, states that "Prisoners should be strip searched before the conclusion of the watch." (Arata Memorandum, Ex. 1 to Declaration of Thom Seaton.) If the end of the watch occurred shortly after the arrestee arrived, that person was then subject to a strip search. Indeed, Sheriff Hennessey has failed to identify any

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[6] Defendants' reliance on authority from other circuits, is of no moment. *See, Rivero v. City and County of San Francisco,* 316 F.3d 857, 865 (9th Cir. 2002) ("The issue is not what the law was or might have been in other circuits in 1993. It is, rather, what the "controlling authority in [the defendants'] jurisdiction [was] at the time of the incident."). But see, Plaintiffs' Reply To Defendants' Opposition To Plaintiffs' Motion For Partial Summary Judgment which addresses Defendants' cited authorities at some length at pp. 10-12, n.4; see also,

1 *written* policy whatever protecting those able to post bail from a strip search. Even Dyer's
2 deposition testimony cited in the Sheriff's papers states that the time permitted to obtain bail
3 depended upon the amount of activity in the intake facility. (Dyer Depo, 25:23-26:2.) Thus,
4 avoiding strip-searches was happenstance, a matter of jail convenience and the need to relieve
5 congestion, rather than a result of a recognized, legally protected status.

6 Finally, here Sheriff Hennessey admitted in his deposition that he *knew* that incorporation
7 of detainees into the general population in and of itself was not a sufficient reason to strip search all
8 persons held pre-arraignment at the jail. An official who admits that the challenged policy is
9 unlawful and unnecessary cannot have made the type of "reasonable mistake" that qualified
10 immunity protects. *(See*, *Parkes v. County of San Diego* 345 F. Supp.2d 1071,1088 (S.D. CA 2004)
11 [where social worker did not believe mother presented threat to children but nevertheless authorized
12 taking of the children from the mother, qualified immunity denied].)

13 **B. Sheriff Hennessey Should Have Known the Jail's Policy for Strip Searching All Safety Cell Placements Was Unlawful**
14

15 The Sheriff asserts that because the Ninth Circuit did not specifically condemn the strip-
16 searching of all detainees placed in safety cells prior to arraignment, Ninth Circuit precedent failed
17 to provide fair warning that his safety cell strip-search policy might result in his liability. Plaintiffs
18 already have noted, per *Hope v. Pelzer* 536 U.S. 730, 739 (2002), that the Supreme Court has
19 rejected the view that "the facts of previous cases be 'materially similar' to the case at hand, or that
20 "an official action is protected by qualified immunity unless the very action in question has
21 previously been held unlawful." *(See, e.g., San Jose Charter of Hells Angels Motorcycle Club v.*
22 *City of San* Jose, *supra,* 402 F.3d at 974-975.)

23 The Ninth Circuit had provided Sheriff Hennessey with notice that it considered strip-
24 searches "dehumanizing and humiliating" *(Kennedy v. Los Angeles Police Department*, *supra,* 901
25 F.2d at 711), and that such searches only could proceed on the basis of individualized reasonable
26 suspicion that those searched would yield contraband. While in some instances the blanket strip
27 search of a class of detainees before arraignment, such as those arrested for crimes involving
28 weapons, drugs or violence, may be sanctioned (no case has yet tested the limits of this proposition),

1 the law has been well-established for years that strip-searches of *categories* of minor offense
2 arrestees must have a discernible relation to the risk that the class of arrestees will smuggle
3 contraband.

4 The Sheriff, therefore, should reasonably have known that blanket strip searches of safety-cell
5 placements before arraignment would leave him vulnerable to suit absent a showing that *all* of these
6 temporary detainees were reasonably suspected as a class to carry hidden weapons or drugs. Yet
7 Sheriff Hennessey has provided no evidence that he formulated this particular strip-search policy due
8 to evidence that those placed in safety cells were prone to hide weapons or drugs on their persons,
9 or that the blanket strip searches were necessary or even advisable for reasons of jail security. The
10 Sheriff, who should have been well aware that strip-searches of minor offense arrestees must be
11 justified by particularized reasonable suspicion, may not escape liability because he was allegedly
12 waiting for a Ninth Circuit decision condemning strip-searches of this particular category, when he
13 knew that these safety cell placements, who were confined in solitary cells *without medical*
14 *authorization,* included the very minor offense arrestees protected from strip search *when brought*
15 *to the jail.*

16 **C. Sheriff Hennessey Should Have Known That the Ninth Circuit Has Limited the**
17 **Strip Search of Arrestees Prior to Arraignment to Those Who Are Charged**
with Offenses Involving Violence in the Absence of Particularized Reasonable
18 **Suspicion**

19 It need hardly be re-emphasized that the Ninth Circuit has repeatedly declared that the Fourth
20 Amendment protects arrestees charged with minor offenses from strip searches when brought to the
21 jail, unless there is individualized suspicion, and has defined "minor offenses" as those not involving
22 drugs, weapons or violence. Plaintiffs Corneau and Zern were searched pursuant to a policy broadly
23 defining "violent" crimes. The overbroad policy obviated the need for individualized reasonable
24 suspicion. Ninth Circuit precedent applying *Bell v. Wolfish* and requiring a security justification for
25 an indiscriminate search of arrestees prior to arraignment – precisely because at this stage the
26 arrestees *have not been charged with any crime* – was clearly established when Corneau and Zern
27 were brought to the jail. It was also clearly established that individualized suspicion was required
28 to strip search those charged with minor offenses. Sheriff Hennessey should have known that his

1 policies must be tailored to conform to this precedent, and that he could not implement a blanket
2 policy that directed strip searches on the basis of the charge alone when the charge did not
3 necessarily or reliably indicate the offense involved violence and therefore the arrestee so charged
4 posed a threat of smuggling contraband into the jail.

5 **CONCLUSION**

6 Clearly established law forbade strip-searching detainees solely because of their classification
7 for housing in the general population or safety cell placement – whether such housing occurred in
8 a rural or urban setting. *(Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989).)
9 Moreover, Sheriff Hennessey has conceded that, without more, the placement in the general jail
10 population of detainees not arrested for crimes involving weapons, drugs or violence is not justified.
11 Therefore he is not entitled to qualified immunity with respect to these policies.

12 The Court must also reject his qualified immunity from liability for strip searching arrestees
13 who were brought to the jail with charges that might or might not involve violence. This was an
14 unconstitutionally overbroad "blanket" policy, the defects of which should have been clear to the
15 Sheriff. The Court therefore must reject Sheriff Hennessey's motion in its entirety.

16 DATED: August 9, 2005 Respectfully submitted,

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19 /s/
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