UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAKISHA BOONE and GEORGE BYRD, both individually and on behalf of a class of others, similarly situated

Civil Action No. 05-cv-1851

Plaintiffs,

v.

THE CITY OF PHILADELPHIA, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Dated: March 23, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The plaintiffs, Nakisha Boone and George Byrd (together, "Plaintiffs"), like all individuals remanded to the custody of the Philadelphia Prison System ("PPS"), were subjected to strip and visual cavity searches upon their admission to PPS facilities, notwithstanding the fact that they were charged with misdemeanors or other minor offenses. The City of Philadelphia admits that it conducts blanket strip searches upon all pre-trial detainees remanded to the custody of the Philadelphia Prison System, regardless of criminal charge or reasonable suspicion. These searches could not be more degrading. All members of the proposed class are required to disrobe in front of a Corrections Officer, and are then required to bend or manipulate themselves to allow for a visual inspection of the genitals and body cavities. Under the City's written strip search policy, these searches are to be done with a Corrections Officer using a flashlight to illuminate body cavities.

The present situation cries out for the Court to issue a preliminary injunction to enjoin the illegal practices of the City of Philadelphia. Despite the filing of this action, compelling discovery taken by the Plaintiffs demonstrates that the City's policy and practice of strip searching all individuals detained in PPS facilities continues nonetheless. Other federal courts, when faced with the same situation, have not hesitated to enter injunctions to protect the constitutional rights of pre-trial detainees. *See, Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y.), *aff'd*, 2005 WL 3117194 (2d Cir. 2005) (class certification, preliminary injunction in strip search class action); *Marriott v. County of Montgomery*, 426 F. Supp.2d 1 (N.D.N.Y. 2006) (summary judgment and permanent injunction in favor of a certified class). Given the circumstances of this case,

where the City has not only violated but continues to violate the constitutional rights of thousands of individuals on a regular and consistent basis, Plaintiffs respectfully urge the Court to issue a preliminary injunction barring the City from continuing to strip search pretrial detainees admitted to the custody of PPS absent reasonable suspicion that the detainee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.

I. Procedural History

Plaintiffs hereby incorporate by reference the procedural history set forth in the Memorandum of Law in Support of Plaintiff's Motion for Class Certification.

On February 23, 2007, after the filing of the class certification motion and with Court approval, Plaintiffs filed an amended complaint against the City naming George Byrd as the second named plaintiff and representative of the Class defined in the certification motion. For the reasons set forth herein, Plaintiffs submit this motion seeking a preliminary injunction barring the City from continuing to illegally strip search pretrial detainees admitted to the custody of PPS absent reasonable suspicion.

II. Factual Background

The facts underlying this motion have been the subject of considerable briefing before the Court, and will only be summarized briefly here. A more thorough recitation of the facts relevant to this motion can be found in the Memorandum of Law in Support of the Plaintiffs' Motion for Class Certification, and the prior briefing before the Court regarding the cross-motions for summary judgment. The City of Philadelphia has admitted in this proceeding, repeatedly, that it conducts uniform strip and visual body cavity searches upon all pretrial detainees admitted to the Philadelphia Prison System.

These searches include forcing a detainee to disrobe in front of a Corrections Officer, and then manipulate themselves to allow for the visual inspection of their body parts and body cavities. Men have their genitals and anus subjected to a visual inspection. Women are subjected to a similar examination, and must also manipulate their breasts. Women are also forced to "squat" to see if any contraband discharges from their vagina. These searches are done on a uniform basis and in the absence of any individualized reasonable suspicion to believe that a detainee is harboring weapons or contraband.

The City's written policies require these indiscriminate searches, and the City's Rule 30(b)(6) deponent, Major James DiNubile, readily admits that this written policy is followed in PPS facilities. (PPS Search Policy, pp. 2, 6, 8 (Keach Aff., Ex. A); DiNubile Dep., pp. 65-66, 141-148, 178-180 (Keach Aff., Ex. B)). While the City has previously claimed that reasonable suspicion existed to strip search Nakisha Boone, the PPS written strip search policy and the City's deponent confirm that the City does not consider whether reasonable suspicion exists to strip search detainees – all detainees are strip searched. (Id.)

As part of discovery in this action, the Plaintiffs have deposed multiple PPS Corrections Officers who have also confirmed that strip searches are conducted on a blanket basis in PPS facilities. Specifically, the Plaintiffs deposed the three Corrections Officers who were reported to be on duty at the time Plaintiff Nakisha Boone was admitted to the custody of the Philadelphia Prison System. All of these officers confirmed that everyone is subjected to a strip and visual cavity search upon admission to PPS regardless of reasonable suspicion or criminal charge, that the practice continues until today, and that no effort is made to determine the background of those being

searched. (Singleton Dep., pp. 38-42, 57-58, 68-69 (Keach Aff., Ex. C); Harold Dep., pp. 99-102, 123-24, 109-111 (Keach Aff., Ex. D); Sareem Bryant Dep., pp. 17-19 (Keach Aff., Ex. E)). A substantial minority of these detainees, namely those arrested on bench warrants, are strip searched prior to even seeing a hearing officer. (*E.g.*, Harold Dep., pp. 117-18). The uniform manner in which these searches are conducted was best described by Corrections Officer Lorraine Singleton, who testified that there are: "No exception[s]. No discrimination to race, weight, height, repeat offender, new admit, the first time come [*sic*] in, there's no discrimination." (Singleton Dep., pp. 57-58).

In short, there is no dispute regarding the facts underlying this action. The City strip searches everyone pursuant to a uniform written policy and formal practice. The Plaintiffs maintain that this policy and practice violates the Fourth Amendment to the United States Constitution, and respectfully request that the Court enjoin the City from continuing to violate the constitutional rights of the Plaintiffs and the proposed class.

III. Preliminary Injunctive Relief is Necessary to Safeguard the Constitutional Rights of Individuals Admitted to PPS Facilities

In order for a preliminary injunction to issue, Plaintiffs must establish the following elements:

> (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief… If factors one and two are established, the court must then consider factors three and four: (3) whether an injunction would harm the [defendants] more than denying relief would harm the plaintiffs and (4) whether granting relief would serve the public interest.

Bowers v. City of Philadelphia, 2007 U.S. Dist. Lexis 5804, *61 (E.D. Pa. Jan. 25, 2007) (internal quotation marks and citation omitted) (*quoting Tenafly Eruv Ass'n, Inc. v.*

Borough of Tenafly, 309 F.3d 144, 157 (3d Cir. 2002)). Here, the Plaintiffs maintain that they have established all of these elements, and that the Court should order the City to cease illegally strip searching detainees admitted to the Philadelphia Prison System.

A. Plaintiffs are Likely to Prevail in this Litigation, As Federal Courts Have Universally Held that Blanket Jail Strip Search Policies are Unconstitutional When Applied to Individuals Charged with Misdemeanors or Other Minor Crimes

i. The City of Philadelphia's Blanket Strip Search Policy, as Applied to Individuals Charged with Misdemeanors and Other Minor Crimes, is Patently Unconstitutional

The Fourth Amendment protects citizens against unreasonable searches and seizures by the government. In the context of searches incident to criminal detention, the United States Supreme Court held in *Bell v. Wolfish*, 441 U.S. 520 (1979), that

> [t]he test of reasonableness under the Fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. An examination of one's naked body, especially someone's anus and vagina, clearly constitutes "an invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993). "[F]ew exercises of authority by the state… intrude on a citizen's privacy and dignity as severely as the visual anal and genital searches practiced here." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). In fact, the visual cavity searches in question here "could not have been more degrading." *Ford v. City of Boston*, 154 F.Supp. 2d 131, 133 (D. Mass. 2001) (Gertner, D.J.)

Circuit Courts, when considering the balancing test required by *Wolfish*, have uniformly held that strip and visual cavity searches cannot be utilized against individuals charged with, but not convicted of, minor crimes (misdemeanors, summary offenses, arrests on bench warrants, etc.) in the absence of reasonable suspicion to believe a detainee is in possession of a weapon or contraband.[1] *See Wood v. Hancock County Sheriff's Dep't.*, 354 F.3d 57, 62 (1st Cir. 2003); *Weber v. Dell*, 804 F.2d 796, 801 (2d Cir. 1986); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981); *Stewart v. Lubbock County*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248, 1253 (6th Cir.), cert. denied, 493 U.S. 977 (1989); *Mary Beth G.*, 723 F.2d at 1273; *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993); *Justice v. City of Peachtree City*, 961 F.2d 199, 193 (11 Cir. 1992). This is because "[r]equiring particularized reasonable suspicion to strip search misdemeanant arrestees balances institutional security needs with individual privacy, which includes a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have one's private parts observed or touched by others." *Wood*, 354 F.3d at 62 (quotation marks omitted).

[1] Over twenty class actions have been successfully prosecuted regarding this practice, including several in major urban areas like Philadelphia. *See Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y., aff'd, 2005 WL 3117194 (2d Cir. 2005) (certification in strip search class action litigated by co-lead counsel in this case); *Kahler v. County of Rensselaer*, No. 03-CV-1324 (TJM/DRH), 2005 WL 1981300 (N.D. N.Y. Aug. 17, 2005) (Troy, Rensselaer County, New York; settlement negotiated by co-lead counsel in this case); *Dodge v. County of Orange*, 226 F.R.D. 177 (S.D.N.Y. 2005) (Newburgh, Orange County, New York); *McBean v. City of New York*, 228 F.R.D. 487 (S.D.N.Y. 2005) (Rikers Island Detention Center, New York City); *Haney v. Miami-Dade Co.*, No. 04-CV-20516-CIV, 2004 WL 2203418 (S.D. Fla. Aug. 24, 2004) (Miami-Dad County Jail); *Mack v. Suffolk Co*., 191 F.R.D. 16 (D. Mass. 2000) (Boston, Suffolk County, Massachusetts); *Bynum v. District of Columbia*, 384 F. Supp. 2d 342 (D. D.C. 2005) (Washington, District of Columbia); *Nilsen v. York Co*., 400 F.Supp. 2d 206 (D. Me. 2005) (summarizing settlements).

Because Corrections Officers "should be able to detect contraband on the person of a detainee without the need for a body cavity inspection… the deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration." *Roberts v. State of Rhode Island*, 239 F.3d 107, 111 (1st Cir. 2001). This is especially true because the individuals in question are pretrial detainees who have not been convicted of a crime. The requirement of reasonable suspicion has been applied regardless of whether the misdemeanants in question were arraigned prior to being committed to a local jail.[2] *See*, *Shain v. Ellison*, 273 F.3d 56, 65 (2d Cir. 2001); *Newkirk*, 834 F. Supp. at 788-90 (post-arraignment misdemeanor detainees at the Schuylkill County Jail).

The courts in this Judicial Circuit have reached a similar conclusion, including several judges of this Court and other courts in the judicial circuit. *See e.g. Newkirk v. Sheers*, 834 F.Supp. 772, 789-91 (E.D. Pa. 1993) (blanket strip searches at the Schuylkill county Jail found unconstitutional as against misdemeanor defendants; "It is beyond doubt that the officially adopted policy of Schuylkill county requiring all individuals admitted to [the] county Prison, including pretrial detainees, undergo strip and visual cavity searches, does not pass constitutional muster to the extent that the policy permits the indiscriminate strip search of a detainee without requiring a particularized reasonable suspicion that the detainee is concealing a weapon or harboring contraband or drugs."); *Duffy v. County of Bucks*, 7 F.Supp. 2d 569, 580 (E.D. Pa. 1998) ("Policies permitting strip-searches of all inmates not based on concerns for institutional security or the

[2] The fact that a detainee is intoxicated does not, in and of itself, establish reasonable suspicion to believe that a detainee is carrying weapons or other contraband. *See, Dodge v. County of Orange*, 209 F.R.D. 65, 77 (S.D. N.Y. 2002) (citing cases from other circuits reaching the same conclusion).

inmate's criminal history have been held unconstitutional," providing extensive citations); *Davis v. City of Camden*, 657 F. Supp. 396, 400-01 (D. N.J. 1987) (strip searches in Camden County Jail); *O'Brien v. Borough of Woodbury Heights*, 679 F.Supp. 429, 433 (D.N.J. 1988) (blanket strip search policy at the Gloucester County Jail).

District Courts from outside of the Third Circuit have also addressed blanket strip search policies, and found them to be unconstitutional. The District of Massachusetts, when faced with a motion for summary judgment brought by a similarly situated female plaintiff and a proposed class of women subjected to a uniform strip search at the Suffolk County Jail in Boston, granted summary judgment and held that

> [a]n indiscriminate strip-search policy routinely applied… cannot be justified simply on the basis of administrative ease in attending to security considerations… While I understand the County's concern over institutional security, that concern does not excuse the county's decision to require the women in the plaintiff class – many of whom had yet to see a judge – to endure the indignities of a strip and visual body cavity search.

Ford, 154 F. Supp. 2d at 142. The United States District Court for the Northern District of New York, when faced with a motion for injunctive relief, has done the same. *See Marriott*, 227 F.R.D. at 168-69, 174. Thus, the City's strip search policy is unconstitutional.

ii. The City of Philadelphia Cannot Now Manufacture Reasonable Suspicion When All Members of the Proposed Class Were Stripped Searched Through a Uniform Strip Search Policy.

To the extent the City plans, after the fact, to manufacture reasonable suspicion to strip search Ms. Boone, Mr. Byrd, or other detainees, they cannot do so in light of their admission that every individual admitted to the PPS is strip searched regardless of

reasonable suspicion. As "the burden rests of Defendants to demonstrate that particular searches were reasonable," to "require Plaintiff[s] to prove that each individual search was unsupportable, as well as indiscriminate, would be unnecessary and unfair." *Mack v. County of Suffolk*, 191 F.R.D. 16, 24 (D. Mass. 2000); s*ee also, Gonzalez v. City of Schenectady*, 141 F. Supp. 2d 304, 309 (N.D.N.Y. 2001 (effort to establish reasonable suspicion after admitting blanket strip searches "defies logic and, frankly, is absurd"); *Davis v. City of Camden*, 657 F.Supp. 396, 401 (D. N.J. 1987) ("[W]hen an arrestee charged with a felony or a misdemeanor involving weapons or contraband is strip searched pursuant to a policy encompassing *all* arrestees, regardless of the nature of their offenses, and where it is conceded that no suspicion regarding the particular arrestee existed, the requisite justification for the search is lacking; neither the general policy nor its particular application is supportable.") (emphasis in original); *Dodge v. County of Orange*, 226 F.R.D. 177, 182 (S.D.N.Y. 2005) ("If individualized assessments were in fact not made, then all the searches were illegal, because each new arrival was constitutionally entitled to an individualized assessment of his or her circumstances… [T]he fact that a particular class member could have been lawfully strip searched if [the correctional facility] had made the constitutionally required assessment is a defense to a particular class member's claim for damages, not a defense to the class-wide claim that the County searched everyone without making any assessment at all."); *Calvin v. Sheriff of Will County*, 2004 WL 1125922, *4 (N.D. Ill. May 17, 2004) ("the ultimate legal question is not whether jail personnel made erroneous reasonable suspicion determinations regarding each individual, but whether the Sheriff's policy avoided all such inquiry, thus depriving those individuals of their Fourth and Fourteenth Amendment

rights."); *Lee v. Perez*, 175 F. Supp.2d 673, 679 (S.D.N.Y. 2001); *Doe v. Calumet City*, 754 F.Supp. 1211, 1221 n. 23 (N.D. Ill. 1990) (the City "cannot justify post-hoc an unreasonable intrusion without showing that each officer involved had such a reasonable basis at the time of the search… [I]n the absence of [a] specific policy [providing guidelines for establishing reasonable suspicion, the] City cannot now manufacture bases in an effort to legitimatize the strip searches that were inflicted on plaintiffs."). Thus, since no effort was made to determine at their entrance whether reasonable suspicion existed, the City is estopped from arguing it now.

iii. Protecting the Security Interests of a Local Jail Does Not Justify the Uniform Strip Search Policy.

The City will assert that strip searching all pretrial detainees is necessary to protect against the admission of drugs and weapons into the prison. The City's blanket strip search policy is clearly unreasonable under the standards enunciated in *Bell*.[3] As an initial mater, this issue has already been addressed by the Eastern District of Pennsylvania. In *Newkirk*, Senior Judge Van Antwerpren assessed the constitutionality of strip search policies at the Schuylkill County Prison. The detainees in question were post-arraignment detainees who were subjected to strip searches upon admission to a local jail because they could not, or would not, make bail. In a thorough and well-

[3] The City's prior contention, made in response to the motion for summary judgment previously filed in this action, that the United States Supreme Court decision in *Turner v. Safley*, 482 U.S. 78 (1997), somehow overrules the balancing testing provided by the Supreme Court in *Bell*, is likewise without merit. *See, Foote v. Spiegel*, 995 F.Supp. 1347, 1359 n.2 (D. Utah. 1998) ("Because the Fourth Amendment test is already one of reasonableness under the circumstances, the court finds that the *Bell* factors, formulated specifically for use in the Fourth Amendment context, are more appropriate for use in this [blanket strip search case] than the factors promulgated in Turner"); *Shain v. Ellison*, 273 F.3d 56, 65-66 (2d Cir. 2001) (holding that Turner does not apply to local correctional facilities); *Jordan v. Gardner*, 986 F.2d 1521, 1540 (9th Cir. 1993) (*en banc*) (concurring opinion) ("If we say that any legitimate penological interest, no matter how minor, requires us to find that a prison's policy is valid, then we cannot find any policy invalid, because a prison will rarely if ever adopt a policy that lacks even a colorable claim of validity. Rather, a prison policy must be invalidated if, after giving due deference to the knowledge and experience of prison administrators, we find that the constitutional infringement outweighs the prison's legitimate penological interests[;]" utilizing *Bell* to evaluate cross-gender strip searches) (emphasis supplied).

reasoned opinion, Judge Van Antwerpen considered the case authority from other circuits, much of which is provided in Plaintiffs' brief, and unequivocally ruled that Schuylkill County's blanket strip policy was unconstitutional. The Court held:

> While the need to ensure prison security is a legitimate and substantial concern, we believe that, on the facts here, the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs' privacy interests, the searches cannot be deemed 'reasonable'… Based on these principles, and a balancing of the factors in *Bell*, we are compelled to find that ensuring the security needs of the Schuylkill County Prison by strip searching g plaintiffs was unreasonable without a particularized suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed.

Newkirk, 834 F. Supp. at 789-90. Although the plaintiffs in *Newkirk* "were placed into contact with the general prison population, such a factor by itself cannot justify a strip search." *Id*. at 789. The Court concluded by holding that "[t]he feelings of humiliation and degradation associated with being forced to expose one's nude body to strangers for visual inspection is beyond dispute." *Id*.; *see also, Thompson v. County of Cook*, 412 F.Supp. 2d 881, 889-90 (N.D. Ill. 2005); *Martino v. County of Camden*, No. Civ. 04-5300 (JBS), 2005 WL 1793718, *12 (D. N.J. July 26, 2005).

In fact, during the course of preparing this case, Defendants performed a thorough investigation of incident reports maintained by the Philadelphia Prison System to determine the actual risk of contraband entering PPS facilities. Lieutenant Edward Bender was initially asked by the City to identify all inmates who were found guilty of disciplinary charges for having contraband. (Bender Dep., p. 50 (Keach Aff., Ex. F)). Lt. Bender then narrowed his search to include only those inmates who were found guilty of such charges within four days of entering prison facilities. (*Id.* at 50-51). For the years

2000-2006, Lieutenant Bender identified 131 individuals who fit these specifications. (*Id*. at p. 64). The Defendant, in its response to Nakisha Boone's Motion for Summary Judgment, found that of those 131 pre-trial detainees that were found to have contraband within four to five days of entering the prison system, only seven were charged with misdemeanor charges and were found to have drugs or weapons in their possession. *See* Defendants' Brief in Support of Mtn. for Summary Judg., at 21-23. While the Plaintiffs have not been able to precisely identify the number of misdemeanor admissions during this time period, they have previously estimated that the City admitted 70,000 misdemeanor detainees to PPS from 2000 through 2006. Of these seven (out of 70,000), five were detained on drugs charges, while the other two had extensive criminal histories. Thus, under a policy employing the reasonable suspicion standard, these individuals would likely have been strip searched anyway.

The Defendant has not demonstrated any security need to require uniform strip searches. *Roberts v. State of Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001); *Ford v. City of Boston*, 154 F. Supp. 2d 131, 137 (D. Mass. 2001) (contraband discovered "five times," or 0.063 percent of the time, during admissions to Suffolk County Jail); *John Does*, 613 F. Supp. 1514, 1522 (D. Minn. 1985) ("plaintiffs make persuasive statistical argument that the possession of contraband by new detainees at the jail is at worst an isolated problem"). The reason why so few detainees are caught with contraband at this stage during their arrest and detention is because "it is far less likely that smuggling of contraband will occur subsequent to arrest…given the essentially unplanned nature of an arrest and subsequent incarceration." *Roberts*, 239 F.3d at 111.

iv. The City of Philadelphia's Policy of Intermingling Pretrial Detainees With Convicted Detainees is Not a Justification for its Uniform Strip Search Policy.

The City asserts intermingling pre-trial detainees with convicted prisoners justifies their uniform strip search policy. "Several courts, including many courts of appeal, however, have held that intermingling alone is insufficient to justify a [strip] search without reasonable suspicion." *Calvin*, 405 F. Supp. 2d at 943. Several other cases detailed in this brief, including *Roberts* from the First Circuit and *Shain* from the Second, have reached this identical conclusion. *See also, Chapman v. Nichols*, 989 F. 2d 393, 394-397 (10th cir. 1993); *Walsh v. Franco*, 849 F.2d 66, 68 (2nd Cir. 1988) (blanket strip searching is not expectable merely because intermingling existed); *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984), *cert. Denied*, 471 U.S. 1053 (1985) (because a detainee was intermingling with a prison population does not, by itself, justify strip search as such intermingling is "both limited and avoidable"). Thus, the City's intermingling policy does not justify its use of a uniform strip search policy.

B. Plaintiffs and Members of the Putative Class are Likely to Suffer Irreparable Injury Without Injunctive Relief

As demonstrated above, Plaintiffs are substantially likely to prevail upon their claim that the constitutional rights of detainees admitted to PPS facilities have been violated. The violation of a constitutional right constitutes irreparable harm which justifies injunctive relief. *Bowers v. City of Philadelphia*, 2007 U.S. Dist. Lexis 5804, *92-93 (E.D. Pa. Jan. 25, 2007) (in a certified class action alleging unconstitutional conditions of confinement at PPS facilities, the court found that irreparable harm would result absent preliminary injunctive relief notwithstanding the fact that the named plaintiffs were no longer pretrial detainees enduring the conditions alleged in the

complaint); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) ("Persons who can establish that they are being denied their constitutional rights are entitled to relief, and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures."); *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Pa. 1997) ("Plaintiffs can demonstrate irreparable harm based on the sole fact that they will be deprived of their constitutional right to the equal protection of law in the absence of an injunction."); *Northern Penn. Legal Services, Inc. v. County of Lackawanna*, 513 F. Supp. 678, 685 (M.D. Pa. 1981) ("Violations of a litigant's constitutional rights constitute "irreparable harm" per se. No other injury is required for an injunction provided that the other necessary ingredients to relief are present."); *Marriott*, 227 F.R.D. at 174 ("The plaintiffs allege violation of a constitutional right. Therefore, irreparable harm is established.").

C. Failure to Grant Injunctive Relief Would Cause Substantial Harm to Plaintiffs and the Class

The balance of the hardships clearly weighs in favor of granting injunctive relief in this case, where individuals' constitutional rights are routinely being violated by the City. *See Bowers*, 2007 U.S. Dist. Lexis 5804 at *92-93 (granting motion for preliminary injunctive relief and finding that "it is abundantly clear that an injunction requiring the City [of Philadelphia] to meet basic constitutional standards for the detention of pretrial arrestees would not harm Defendants more than denying relief would harm Plaintiffs. The only harm to Defendants is the cost associated with providing conditions of detention that pass constitutional muster while the cost to Plaintiffs, denial of constitutional rights, is far greater."). The potential of security risks to PPS facilities, which is limited by PPS' admission that very few detainees admitted to their facilities had contraband secreted in a

body cavity, is significantly outweighed by the serious privacy interests that are intruded upon in connection with the indignity of a strip search. This point has been consistently articulated by courts applying the *Wolfish* balancing test and holding that individuals detained on misdemeanor charges may only be strip searched if reasonable suspicion exists to believe the detainee is armed or carrying contraband. *See e.g., Wood*, 354 F.3d at 62 ("we have recognized that strip searches are intrusive and degrading and, therefore, should not be unreservedly available to law enforcement officers") (internal quotation marks omitted); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) ("While the need to assure jail security is a legitimate and substantial concern, we believe that, on the facts here, the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees' privacy interests, the searches cannot be considered "reasonable."); *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 86 (D.N.Y. 2003) (granting permanent injunction enjoining unconstitutional strip search policies at county jail and noting that "[h]aving one's constitutional rights violated is, a priori, a substantial hardship. Moreover, the nature of this particular constitutional violation, being strip searched, represents a serious intrusion that is often humiliating, even when performed in the most professional manner.").

What is more, the narrow scope of the injunctive relief sought here takes security risks into account inasmuch as the requested "injunction does no more than require the police to abide by constitutional requirements." *Allee v. Medrano*, 416 U.S. 802, 814 (1974). Correctional Officers may, in other words, continue to strip search individuals as long as they make the necessary evaluation in order to determine that there is reason to believe those individuals are carrying contraband. The officers can look at the nature of

criminal charges, the past criminal history of the detainee, the personal circumstances of the detainee, or any number of other factors to establish individualized reasonable suspicion to search. The only limitation which would be placed upon Correctional Officers by the injunctive relief requested is that detainees could not be strip searched *automatically*.

D. Granting Relief Would Serve the Public Interest

There is no doubt that a significant public interest would be served by protecting the constitutional rights of Plaintiffs and the Class. *St. Claire v. Cyler*, 482 F.Supp. 257, 260 (D.C. Pa. 1979) (administering a prison under constitutional principals serves public purpose); *Monmouth County Correctional Inmates v. Lanzaro*, 643 F.Supp. 1217, 1228 (D.N.J. 1986). *See e.g. Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."); *United States v. Weikert*, 421 F. Supp. 2d 259, 271 (D. Mass. 2006) ("the public interest in fact favors the granting of the preliminary injunction since the public has a significant interest in upholding the protections of the Fourth Amendment."); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 951 (D. Mo. 2004) ("It is not in the public's interest to allow police and other officials to engage in a pattern of constitutional violations."). To that end, a preliminary injunction should be issued.

IV. Plaintiffs Have Standing to Seek Injunctive Relief

The City has previously raised the issue of Ms. Boone's standing in this litigation, claiming that she "has not alleged and cannot credibly allege that she reasonably can anticipate again being arrested and, even if she were arrested, eventually being

transported to the Prisons." Defs.' Mem. Law Supp. Summ. J. at 39. This exact argument has, however, already been addressed and rejected by Judge Surrick in *Bowers v. City of Philadelphia*, a similar case filed to redress constitutional violations occurring within the PPS.

Like the present lawsuit, *Bowers* was brought as a putative class action on behalf of pre-trial detainees in the PPS. The plaintiffs there allege the existence

> of severe prison overcrowding and concomitant dangerous, unhealthy and degrading conditions. Plaintiffs allege that these conditions and the policies and practices of Defendants violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that they are pre-trial detainees who, due to severe overcrowding and lack of adequate facilities, are held at police districts, the Police Administration Building, or at intake units of the PPS.

Bowers, 2006 U.S. Dist. Lexis 71814, *2-3 (E.D. Pa. Sept. 28. 2006). In the context of addressing the plaintiffs' class certification motion, the Court in *Bowers* rejected the City's argument that the plaintiffs lacked individual standing to seek injunctive and declaratory relief. Citing *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *United States Parole Commission v. Geraghty*, 445 U.S. 338 (1980), the Court referenced an exception to the mootness doctrine which "exist[s] to address short-term harms that would otherwise evade judicial review." *Bowers*, 2006 U.S. Dist. Lexis 71814, *21. Judge Surrick held that:

> This case belongs… to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other

> persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."

Id. (*quoting Gerstein*, 420 U.S. at 111 n. 11). Concluding that the plaintiffs did, in fact, have standing to bring the class action for injunctive and declaratory relief, the Court stated:

> Given that Plaintiffs allege severe prison overcrowding and dangerous, unhealthy, and degrading conditions and given that it is certain that other pretrial detainees are currently and will in the future be detained under the allegedly unconstitutional conditions, this case certainly belongs to the class of cases for which an exception to mootness must be made.

Bowers, 2006 U.S. Dist. Lexis 71914, *23-24.

Later in the litigation, Judge Surrick considered a "slightly different" version of the City's standing argument in the context of the plaintiffs' motion for a preliminary injunction. *Bowers v. City of Philadelphia*, 2007 U.S. Dist. Lexis 5804, *95 (E.D. Pa. Jan. 25, 2007). Within that framework, the City contended that the plaintiffs lacked standing and the Court lacked jurisdiction because at the time the complaint was filed, "no named plaintiff or class representative had a live claim in that no named plaintiff was in the custody of either Police Department holding cells or CFCF intake at that time." *Bowers v. City of Philadelphia*, 2007 U.S. Dist. Lexis 5804 at *95.

As an initial matter, the Court concluded that the named plaintiff, held in quarantine at the time the lawsuit was filed, did in fact have standing to pursue injunctive relief at the commencement of the suit. *Id*., 2007 U.S. Dist. Lexis 5804 at * 98. Significantly, the Court further held that even if the named plaintiff's presence in quarantine had not provided him with standing to sue, two additional grounds existed

establishing both standing and jurisdiction. First, the detainee Class members "had no meaningful ability to request counsel visits or demand the right to file a complaint in federal court" during the course of their detention. *Id*., 2007 U.S. Dist. Lexis 5804 at *102. Thus, it would have been impossible for the plaintiffs to file suit while they were detained in PPS facilities. Also, the Court concluded that due to recidivism rates of the named plaintiffs, the case presents a situation which is "capable of repletion, yet evading review." *Id*., 2007 U.S. Dist. Lexis 5804 at *102; *see also City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (doctrine "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."); *Marriott v. County of* Montgomery 227 F.R.D. 159, 174 (N.D.N.Y. 2005) (Pretrial detainees had standing to bring preliminary injunction claims for unlawful strip search policy of prison). For these reasons, Judge Surrick concluded that the plaintiffs had standing to pursue injunctive relief and that the Court's jurisdiction was intact.

The same rationale applied by Judge Surrick in the decisions issued in *Bowers* should apply under these circumstances. Where, as here, there can be no doubt that other pretrial detainees are currently and will in the future be subjected to unlawful strip searches in PPS facilities, the standing of the named plaintiffs to seek injunctive and declaratory relief to correct the unconstitutional treatment of pretrial detainees held in PPS facilities is obvious.

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for a Preliminary Injunction and issue the proposed order attached hereto.

Respectfully submitted by:

/s

Dated: March 23, 2007

Daniel C. Levin, Esquire
Identification No. 80013
Levin, Fishbein, Sedran & Berman
510 Walnut Street, Ste. 500
Philadelphia, PA 19106
Telephone: 215-592-1500
Telecopier: 215-592-4663
Electronic Mail: dlevin@lfsblaw.com

Elmer Robert Keach, III

Digitally signed by Elmer Robert Keach, III
DN: CN = Elmer Robert Keach, III, C = US, O = Law Offices of Elmer Robert Keach, III, PC, OU = Admitted Pro Haec Vice
Date: 2007.03.23 19:55:28 -04'00'

Elmer Robert Keach, III, Esquire
LAW OFFICES OF
ELMER ROBERT KEACH, III, PC
1040 Riverfront Center
Post Office Box 70
Amsterdam, NY 12010
Telephone: 518.434.1718
Telecopier: 518.770.1558
Electronic Mail:
bobkeach@keachlaw.com

Jonathan W. Cuneo, Esquire
Charles LaDuca, Esquire
Alexandra C. Warren, Esquire
Identification No. 93651
CUNEO GILBERT & LADUCA, LLP
507 C Street, N.E.
Washington, DC 20002
Telephone: 202.789.3960
Telecopier: 202.789.1813
Electronic Mail: CharlesL@cuneolaw.com

Gary E. Mason, Esquire
Nicholas Migliaccio, Esquire
THE MASON LAW FIRM, PLLC
1225 19th Street, NW
Suite 600
Washington, DC 20036
Telephone: 202.429.2290
Telecopier: 202.429.2294
Electronic Mail: gmason@masonlawdc.com

Laura Feldman, Esquire
Identification No. 49459
FELDMAN & PINTO
1604 Locust St., 2R
Philadelphia, PA 19103
Telephone: 215-546-2604
Telecopier: 215-592-4663
Electronic Mail:
LFeldman@FeldmanPinto.com

Christopher G. Hayes, Esquire
Identification No. 57253
115 East Chestnut Street, 2nd Floor
West Chester, PA 19380
Telephone: 610-431-9505
Telecopier: 610-431-1269
Electronic Mail:
CHayes@FeldmanPinto.com

Kevin Birley, Esquire
Ostriat & Associates, LLC
1800 John F. Kennedy Blvd.
Suite 300
Philadelphia, PA 19103

ATTORNEYS FOR PLAINTIFFS AND THE PROPOSED CLASS