UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIC JONES, et al. Plaintiffs v. **SUSAN MURPHY**, et al. Defendants	Civil Action No. **CCB 05 CV 1287**

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Eric Jones *et al.*, Plaintiffs, by and through undersigned counsel, file this motion pursuant to Fed. R. Civ. P. 56 ("A party claiming relief may move . . . for summary judgment on all or part of the claim.")

ISSUE

Whether the gender-differentiated search policies for male and female arrestees at Baltimore Central Booking and Intake Center, as set forth in post orders prior to January 1, 2006, under which men, but not women, were to be searched to their last layer of clothing, violated the Equal Protection Clause. [1]

[1] The parties disagree as to the actual strip search practices. Plaintiffs' claim as to the searches to the underwear (Count 11 of the Fourth Amended Complaint) is plead and argued in the alternative to the Counts dealing with bare skin searches.

The Defendants' position is that the post orders reflect the actual practice, and that CBIC staff searched males (but not females) only down to their underwear.

INTRODUCTION

Defendants' alleged policy of subjecting male but not female arrestees to underwear searches violates the Equal Protection Clause because the classification is based on gender stereotypes and assertions not supported by objective experience and data. The Defendant Wardens and State offer no objective data in support of their basic premise that males are substantially more likely than females to try to introduce contraband into the Baltimore Central Booking and Intake Center (CBIC), such that a more invasive search of male arrestees is justified. This policy is challenged in Count 11 of the Fourth Amended Complaint.

This motion seeks judgment on the constitutionality of the policy claimed by the Wardens.

However, Plaintiffs contend that, through much of the class period, CBIC staff subjected arrestees to strip searches down to their bare skin, either by a full-naked search or a search by which pants (or skirts) and underwear were pulled to the knees. The underwear searches may be viewed as a "lesser included offense" of skin strip searches, because a person has to be searched down to his underwear before he can be searched down to his skin, and thus represents an area of factual agreement for the parties (*i.e.*, that all men were at least searched to their underwear). But the Plaintiffs' position is that the blanket searches did not stop at the underwear for men (or at patdowns for women).

By seeking summary judgment on the issue of whether the Defendants' alleged search policy was unconstitutional, the Plaintiffs are not abandoning their claim that the Wardens subjected arrestees to searches down to their skin during the class period. Plaintiffs reserve for another motion the issue of whether CBIC officers (with the acquiescence of the Wardens) were subjecting males and/or females to searches down to the skin, and whether this more invasive search was the actual policy and practice.

STATEMENT OF FACTS

Male and female incoming arrestees for the City of Baltimore go to the CBIC and get processed through various posts prior to presentment: Sallyport → Medical Triage → Search Room → Booking → Identification → Telephone Call → Holding → Commissioner (if charged).[2] The CBIC, on other floors, also houses persons committed pending trial. Approximately 80% of arrestees entering the CBIC are male. **Exhibit 101**, Deposition of Benjamin Brown III, p. 273 (hereinafter "Brown").[3]

The CBIC Post Orders for searching arrestees in the search room, prior to January 1, 2006, read:

Post Order, Female Search Officer, Eff. Date 11/16/98 (Rev. 8/20/04), Exhibit 102.	**Post Order, Men's Search Officer, Eff. 11/16/98, Rev. 8/20/04), Exhibit 103.**
Upon arrival, all offenders [sic] will be pat frisk searched.	Upon arrival, all offenders [sic] will be searched down to the underwear.[4] If the search room officer suspects contraband is being concealed beneath the underwear, then a strip search will be conducted.

The disparate search policies are also described by Assistant Commissioner Brown in his deposition testimony. Brown 209-210. Effective January 1,

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2 The State runs CBIC pursuant to a statutory state takeover of the City's pretrial detention facilities. Ann Code of Md., Corr. Servs. § 5-101 *et seq.*

3 Exhibit numbers continue from those previously filed in this case.

4 The post orders also require a pat frisk search of male arrestees. **Exhibit 105**, Post Order, Men's Sallyport, Eff. 12/1/97, Rev. 8/20/04. Therefore, the search of male arrestees to the underwear is not in lieu of a pat frisk, but in addition to it.

2006, the search policies for male and female arrestees at CBIC are the same (both to be searched to their underwear). **Exhibits 106 and 107**.

If weapons or sharp objects are found on an arrestee in the Sallyport or Search Room, the item is discarded without entry in a log. **Exhibit 108** (excerpt), Deposition of Vernon Irvine, pp. 101-102, 106; **Exhibit 109** (excerpt), Deposition of Delphries Watties, pp. 33-35; **Exhibit 110** (excerpt), Deposition of Maurice Diggs, pp. 24, 27-28; **Exhibit 111** (excerpt), Deposition of Kevin Estep Jr., pp. 19-20; **Exhibit 112** (excerpt), Deposition of Lisa Taylor, pp. 38-39.

Meanwhile, illegal drugs found on arrestees are turned over to a police liaison without entry in a log. Exhibit 108 pp. 100-102; Exhibit 109 p. 35; Exhibit 110, pp. 28-29; Exhibit 111 pp. 21-22, 39-40 (stating that illegal drugs get recorded in contraband log only if found on the ground and not attributable to an arrestee); **Exhibit 113** (excerpt), Deposition of Katherine Blackmon, pp. 35-39, 114-115; **Exhibit 114** (excerpt), Deposition of Beverly Stevenson, p. 51; Exhibit 112 p. 39; **Exhibit 115** (excerpt), Deposition of Denise Banks, pp. 52-55, 57-58; Brown pp. 60-61 (no log made if drugs found on arrestee).

On October 25, 2007, and continued on November 14, 2007, the Plaintiff took a Limited 30(b)(6) deposition of the State of Maryland. As set forth in the Notice of Deposition, "[b]y agreement of the parties and deponent, the subject matter of this deposition will include the policies and practices for searching arrestees, and facts, findings, and conclusions allegedly justifying such policies and practices, at the Baltimore Central Booking and Intake Center." The State

designated Benjamin Brown III, Assistant Commissioner (and Acting Deputy Commissioner) for the Maryland Division of Pretrial Detention and Services.[5]

Mr. Brown had previously stated in an Affidavit that "It was the experience of the Division that male arrestees entering BCBIC were far more likely than female arrestee to have in their possession weapons, such as knives and, on occasions, guns, which, in turn, pose a severe threat to the safety and security of the persons on the booking floor. The Division, therefore, implemented and maintained the gender-differentiated initial search policy. . .." **Exhibit 116**, Affidavit of Benjamin Brown.

Mr. Brown testified at the deposition that a contraband log shows what types of contraband have been recovered in the entire facility (*i.e.*, not limited to the booking floor). Brown 106-108.[6] No effort has ever been made to analyze (1) what is found, (2) where it is found, or (3) what search procedure, if any, revealed the contraband. Brown 109-112. In addition, no effort has been made to compare the rates by which contraband is recovered from females (or female areas) versus males. Brown 111-112. **In fact, no effort has been made to collect or analyze data from any source to compare the rates at which male versus female arrestees entering the facility possess contraband**:

> Q: Well, has anybody ever gone through any kind of log or writing or reports or anything at Central Booking to compare the

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5 The Division runs CBIC.

6 This would not include contraband recovered on arrestees in the Sallyports or Search Rooms upon entry into CBIC.

relative frequency with which contraband is recovered from males as opposed to females?

Mr. Brown: Not that I know of.

Q: Do you know why?

A: No.

Q: Would it be useful in administering the facility to know on an objective basis whether males or females are bringing in more contraband

MR. POTHIER: Objection.

A: Like any data that's available to management, it can be useful. I'm not sure that whether – I'm not sure why.

Brown 112-113.

Additional questioning specifically focused on weapons revealed a similar lack of investigation or study:

Q: [Has} anybody ever made an analysis of weapons recovered from people in Central Booking to determine whether more weapons are recovered from males or females or vice versa?

A: Not that I know of.

Q: So there's no type of study or investigation based on objective data that's been conducted to see whether males introduced more weapons into Central Booking than females?

A: Not that I'm aware of.

Q: How about cases where people have attempted to introduce weapons into Central Booking and the weapons were detected at some point, has anybody ever done any type of investigation or analysis to determine whether males attempt to introduce more weapons into Central Booking than females?

A: Not that I'm aware of.

Brown 113-114; see also, Brown 119-121.

Mr. Brown has no opinion as to whether men or women are more likely to attempt to introduce contraband other than weapons into CBIC. Brown 207-208.

As to his affidavit, Mr. Brown stated that his statement that "male arrestees entering BCBIC were far more likely than female arrestee to have in their possession weapons, such as knives and, on occasions, guns" would mean something along the lines of 5 women out of 100 would have a weapon or item that can be used as a weapon, versus 30 men out of 100. Brown 221-222.[7] However, Mr. Brown has no idea whether those estimates are correct:

> Q: Do you have any estimate of the percentage of male arrestees who come into Central Booking with weapons or things that can be used as weapons in their possession?
>
> A: No, I don't have an estimate, I'm not aware of an estimate being made.
>
> Q: Do you have an estimate of the percentage of female arrestees coming into Central Booking having in their possession either weapons or other items that can be used as weapons?
>
> A: No.
>
> Q: When you wrote that male arrestees are far more likely than female arrestees, what do you consider to be far more likely, that phrase you used?
>
> A: Oh, probably define far more likely in – one in a hundred for women, ten, twelve, fifteen in a hundred for men.
>
> Q: But you don't know, do you, whether or not those are what the actual numbers are?

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[7] Though the plural "guns" was used in the affidavit, only one man is known to have possessed a gun upon entering CBIC. Brown 223. Mr. Brown does not know where or how it was recovered, *e.g.*, whether it was recovered by way of an underwear search. Id. 226.

A: No.

Brown 262-263.

Mr. Brown justifies the statement in his affidavit based on subjective, vague, and unquantified conversations he had with several persons. On one occasion "a long time ago," Kenneth Bartee, the security chief for the Baltimore City Detention Center (not CBIC), allegedly stated that he believed males were more likely than females to try to introduce weapons at the Detention Center, and Mr. Brown also testified that "I believe Chief Merritt has indicated that that's what he believes." Brown 195-201. Later, Mr. Brown identified comments from several persons: Security Chief Childs, Warden William Jednorski, Assistant Warden France, Warden Susan Murphy, Major Whitley, Major Becketts, Major Shields, and a "couple of representatives from the Baltimore City Police. Brown 270.

As to each, Mr. Brown testified as follows.

Security Chief Childs

> Brown: I remember Chief Childs commenting more about the likelihood of the police missing weapons, but by inference that he was talking about males,
>
> Q: By inference how?
>
> A: We were talking about the male sallyport at the time.
>
> Q: So the discussion didn't relate to males versus females, did it?
>
> A: No.
>
> Brown 271.

Warden Jednorski

Brown: Again, a similar comment about the experience with the police missing things, that his was – I do remember some comment about being concerned about men bringing weapons in, not, not women.

Q: Do you know why he stated that concern?

A: I – my assumption is based on his experience as a corrections professional for twenty-five or thirty-five years.

Q: So from what you could tell, he wasn't concerned about women bringing weapons into the facility?

A: Not – not as concerned as he was about men.

Q: Did he say why?

A: I don't recall him ever saying why.

Brown 271-272

Assistant Warden France

Brown: The only conversation I can recall with Mr. France was concerning the use of metal detector equipment.

Q: What discussion did you have?

A: As to whether it was worth us considering trying to find funding to put a similar metal detector in the women's sallyport as we have in – had in the men's at the time.

Q: What did you decide?

A: Not to.

Q: Why not?

A: It – basically they couldn't justify it, that's his statement, that he couldn't justify the expense.

Q: Do you know why not? Did he say why not?

A: I don't recall whether he actually said why not or not.

Brown 272-273.

Warden Murphy

Q: What discussion did you have with Warden Murphy regarding weapons entering the facility through incoming arrestees?

A: Just general discussion of the need for the staff to make sure that the police didn't miss something.

Q: Did that discussion relate to men versus women?

A: As best as I can recall, it was generally addressed to the men's sallyport.

Q: Why do you believe that?

A: Because that's where we, we were at the time when we were talking about it.

Brown 273-274.

Majors

Q: Do you recall any of specific discussions you had with any of the majors that you mentioned, being Majors Whitley, Beckett, and Shields?

A: No, I can't recall any, the specifics of any discussions.

Brown 274.

Baltimore City Police

Q: You also mentioned discussions with Baltimore City Police. Do you recall any specific –

A: No, I don't. . ..

Brown 274.

Mr. Brown testified that the following are some items that could be used as weapons: pieces of metal, pieces of plastic, fragments of glass, knitting needles, keys, key rings, rings, bracelets, boots, earrings, scarves, shoestrings.

Brown 299-300. Mr. Brown conceded that women are just as likely as men to have these items. Brown 299-300.

Mr. Brown further testified as to the relationship between the charge a person is arrested for, and the likelihood that the person possesses a weapon. Brown 224-226.[8] Mr. Brown alleged that men are more likely than women to enter CBIC for violent crimes. Brown 287. He testified that he does not know if the crime charged, rather than gender, is the relevant variable and therefore could account for any perceived differences in men versus women having weapons in their possession. Brown 288. He has absolutely no information or opinion as to whether similarly-situated males and females have any difference in the likelihood of having weapons in their possession. Brown 288-289. In fact, Mr. Brown considers the arrest charge a potentially more relevant factor than gender. Brown 289-290 (stating that it would be more important to search a women arrested for attempted murder and possession of cocaine than a man arrested for driving on a suspended license).

ARGUMENT

I. Gender Discrimination Is Subject to Heightened Scrutiny

Governmental gender discrimination violates the Equal Protection clause unless the government shows an "exceedingly persuasive justification" for the disparate treatment. United States v. Virginia, 518 U.S. 515, 531 (U.S. 1996)

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8 The arrest charge is listed on the toe tag of each arrestee who enters CBIC. Brown 291-292.

(involving the Virginia Military Institute, at times hereafter referred to as the "VMI case"). To meet its burden of establishing an "exceedingly persuasive justification," the government must show "at least that [i] the classification serves important governmental objectives and that [ii] the discriminatory means employed are substantially related to the achievement of those objectives." Id. at 524.

The Court stated it is not an easy burden:

> The burden of justification is demanding and it rests entirely on the State. The State must show 'at least that the [challenged] classification serves "'**important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives**.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. (citations omitted)

Id. at 533 (emphasis added).

All gender-based classifications today warrant "heightened scrutiny." Id. at 555. The mere recitation of an alleged "benign purpose" does not block inquiry into the "actual purposes" of government-maintained gender-based classifications. Id. at 536. The reviewing court must make a "searching analysis" of the government's "alleged objective" for establishing the gender based classification. The VMI Court did not define the term "searching analysis," but, as part of its analysis of gender stereotypes, the Court relied on objective "field studies" based on quantifiable data to evaluate Virginia's "alleged objective" for establishing the gender based classification at VMI. The Court notes that field studies in other cases did not confirm gender-based,

stereotyped fears that allowing women to engage in medical and policing professions and studies of performance of women in the nation's service academies and the military would lead to reduced standards. Id. at 544.

II. Defendants' Policy of Subjecting Males But Not Females to Underwear Searches Violates the Equal Protection Clause Because the Classification Is Based On Gender Stereotypes and Not Experience and Data

A. Courts Require Studies Based On Objective Data and Not Just Conclusory Affidavits to Justify Gender Based Classifications

Lower courts both before and after VMI have required government actors to justify gender based classifications by studies based on objective data. For example, in Mary Beth G. v. Chicago, 723 F.2d 1263, 1273-1274 (7th Cir. 1983), the City of Chicago (the "City") maintained a policy of subjecting females (but not males) arrested on minor charges to strip searches. The City introduced several affidavits of security personnel and one statistical survey in an attempt to show that weapons and contraband can be and have been concealed in the vagina and thus the decision to search males and females differently was based on the documented ability of female arrestees to secrete weapons and contraband in the vaginal cavity and the inability to discover such items by a thorough hand search. Mary Beth G. v. Chicago, 723 F.2d at 1274. But, the Court held that since the evidence also showed that males had body cavities in which contraband could be secreted, the government failed to show why its objective of ensuring the security of the City lockups required it to search the vaginal cavity but not the body cavities of males, which can be and occasionally are used to conceal weapons or contraband. Id. The Court

held that the City could not show a "substantial relation between the disparity and an important state purpose" because the City has "offered no **comparative data** to suggest that women arrested for minor offenses conceal items in their vaginas to such a degree as to justify strip searching only women and not men arrested for similar offenses." Id. (emphasis added).[9]

In Deblasio v. Johnson, 128 F. Supp. 2d 315, 328 (D. Va. 2000), a post VMI case, the Court relied on "experience and data" to uphold a gender based classification on grooming rules. In Deblasio, the Court upheld a grooming rule requiring males to wear their hair shorter than females because of alleged security concerns. The State based the gender-based hair grooming rules on a study of Serious Incident Reports since 1989 which showed that a male was approximately four times more likely than a female to be cited in the Serious Incident Reports in an incident involving violence. Deblasio v. Johnson, 128 F. Supp. 2d 315, 327 n.6 (D. Va. 2000). But in this case, unlike the government in Deblasio, the Defendants offer no objective data in support of the claim that males are more likely to introduce contraband into CBIC. (Also, the Defendants have not established that the underwear search is substantially-

9 Corrections officials have at times tried, unsuccessfully, to justify more invasive searches of women than men, on the theory that women are more likely to secrete contraband. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Mack v. Suffolk County, 154 F. Supp. 2d 131, 134 (D. Mass. 2001); Gary v. Sheahan 1998 U.S. Dist. LEXIS 13378 (E.D. Ill. 1998); Johnson v. District of Columbia, 461 F.Supp.2d 48 (D.D.C. 2007) (denying qualified immunity defense on claim that women, but not men, were subjected to pre-presentment strip searches).

related to achieve its objective of ensuring the security of CBIC, or that the justification was made at the time of the classification.)

In the context of searches of arrestees, this Court has held in this case, in denying the Wardens' claims for qualified immunity, that the right to be free from a gender-differentiated search (whether a full strip search or to the underwear) was clearly established well before the time period in this case. Jones v. Murphy, 470 F. Supp. 2d 537, 548 (D. Md. 2007).

B. The Defendants Lack Any Objective Data or Analysis to Support the Gender-Differentiated Search Policy

In this case, the Defendants have no comparative data to show that the incidence of items found via underwear searches of males was so much greater than items that could have been found if women were subjected to a similar search. Therefore, the Wardens have not met their burden of demonstrating that the difference in gender alone justified the disparate search treatment accorded males and females. Mary Beth G. v. Chicago, 723 F.2d 1263, 1274 (7th Cir. 1983).

The State, through its 30(b)(6) deposition, conceded that it has never done an analysis of data, or even attempted to collect data, to learn whether men are more likely to possess weapons, or whether similarly-situated male arrestees (*i.e.*, when controlling the variable of the arrest charge) are even the slightest bit more likely than female arrestees to possess weapons. In fact, it appears that the State has avoided collecting and keeping any such data by

declining to make log book or computer entries of contraband found. The State further conceded that, regarding items that may not be designed as weapons but could be used as such, it had no reason to believe that men were more likely to possess such items.

Additionally, there is absolutely no evidence to suggest that, prior to implementation of the policy, there was any marked difference in the rates of possession of weapons, or items that can be used as weapons, between the two genders. If one gender has been searched but the other has not, it may result in more items being found on the searched gender than the unsearched gender. But this may well result not because one gender is more likely to possess weapons or things that can be used as weapons, but because only one gender was searched (not that any objective data has been presented on the question of whether, even with the searching of men and non-searching of women, more weapons and things that can be used as weapons have been found on men).

Without data collected or analyses conducted prior to the implementation of the policy, and without any evidence as to the time of implementation of the policy, [10] the State cannot show that the stated justification was not a post hoc creation to justify the existing policy, or that it

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[10] The Defendants have been unable to produce any versions of search room post orders that existed prior to the post orders revised August 20, 2004.

was based on anything other than rumor, prejudice, or inconsistent and unreliable anecdotal reporting.

III. The Disparate Search Policy is Not Substantially-Related to Any Important Government Objective

Because there is no objective data to support the State's claim that the disparate-search policy was warranted, the policy fails to survive the heightened scrutiny.

Furthermore, even if the State's claimed anecdotal perception that male arrestees are substantially more likely to possess weapons had been supported by data, the policy still must have been substantially-related to the important government interest (here, a safe booking facility). It was not so related.

First, when looking at not just weapons but also objects that can be used as weapons, the State conceded that it had no information to believe that men were more likely to possess such potentially dangerous items.

Second, the State has not claimed that no female arrestees have possessed weapons, so the State would have to explain why it does not have an important government interest in finding weapons possessed by female arrestees, or if it does have such an interest, why it believed a lesser search worked for women but not men. If the lesser search for women protected the government's important interest, then a greater search for men would not be substantially-related to the government interest.

Third, the State is unable to quantify any perceived difference between the rates that male and female arrestees possess weapons. Vaguely claiming that men are "more" or even "substantially more" likely to possess weapons, without quantification, and based solely on self-serving and vague anecdotal statements, leaves one unable to sustain the State's claim that the policy was substantially-related to the government interest. It must be remembered that the State bears the burden.

Fourth, the State has conceded that it had no reason to believe that similarly-situated males were more likely to possess weapons than women. When looked at on a charge-neutral basis, the State had no reason to believe that men possessed weapons at a greater rate than women, such that searching a man arrested for driving on a suspended license, but not a woman arrested for attempted murder and cocaine possession, would make any sense at all. Brown 289-290.

The State has not shown that the gender-differentiated search policy set forth in the post orders prior to January 1, 2006, were substantially-related to an important government interest.

CONCLUSION

The Defendants have no objective data to support the claimed perception that male arrestees at CBIC are substantially more likely than female arrestees to possess weapons, or that male arrestees are any more likely than female

arrestees to possess objects that can be used as weapons. The Defendants rely solely on subjective, unquantified, anecdotal statements made after the policy was created.

The State has also failed to demonstrate that, if substantially more men than women had possessed weapons, that the disparate search policy of searching men but not women to their underwear was substantially-related to an important government interest.

Therefore, the Court should rule that the gender-differentiated search policy that existed prior to January 1, 2006, violated the Equal Protection clause.

Respectfully submitted,

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