

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WILLIAM ROBERT BRADSHAW,
RANDALL LEE GERIK, on behalf of
themselves and the class of similarly situated
persons;

Plaintiffs,

V.

MCLENNAN COUNTY; MCLENNAN
COUNTY SHERIFF' S OFFICE;
MCLENNAN COUNTY SHERIFF LARRY
LYNCH, in his individual and official
capacity; MCLENNAN COUNTY SHERIFF
DEPUTIES DOES 1 THROUGH 50, AND
ROES 1 THROUGH 20, INCLUSIVE,

Defendants.

CASE NO: 6:08-CV-00246 WSS

**PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

I. INTRODUCTION

Plaintiffs William Robert Bradshaw, and Randall Lee Gerik hereby move for class certification under Rule 23 (a) (3) of the Federal Rules of Civil Procedure. Plaintiffs move for certification of the following classes:

Class A, represented by Plaintiff William Bradshaw:

All persons, during the applicable statute of limitations (two years before the filing of the Complaint on September 8, 2008), and continuing until Defendants' custom and policy was brought into compliance with the law, who were arrested and booked at the McLennan County Jail on "minor offenses," that is,

- on any charge (including felonies) not involving weapons, controlled substances, or violence;
- not involving a violation of parole or probation for such offenses,
- without a history of such offenses within the last two years,

and who were subjected to a strip search by defendants before arraignment at the McLennan County jail pursuant to Defendants' uniform and indiscriminate ("blanket") policy and custom of conducting such strip searches, without any individualized reasonable suspicion that the persons searched were concealing contraband.

Class B, represented by Plaintiff Randall Gerik:

All persons, during the applicable statute of limitations (two years before the filing of the Complaint on September 8, 2008), and continuing until Defendants' custom and policy is brought into compliance with the law, who were arrested and booked at the McLennan County Jail on "minor offenses," that is,

- on any charge (including felonies) not involving weapons, controlled substances, or violence;
- not involving a violation of parole or probation for such offenses,
- without a history of such offenses within the last two years,

and who were subjected to a strip search, including a visual body cavity inspection¹ by defendants before arraignment at the McLennan County jail pursuant to Defendants' uniform and indiscriminate ("blanket") policy or custom of conducting such strip searches, without any individualized reasonable suspicion that the persons searched were concealing contraband.

Plaintiffs also request that Plaintiffs' counsel be appointed to represent the certified classes, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

**II. MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Plaintiffs submit this Memorandum in accordance with Rule CV-23 and Appendix A of the Local Rules of the United States District Court for the Western District of Texas. The Motion and this Memorandum are provisional, pending discovery of specific information within Defendants' custody and control concerning the following factual issues: the number of persons in each class who have been booked at the McLennan County Jail within the applicable period of limitations; the Sheriff's policies and customs pertaining to the strip search of arrestees before arraignment; and the Sheriff's

¹ Definition of Visual Body Cavity Search: Arrestees are instructed to remove all of their clothing, and hand each piece of clothing to the deputy who puts them in a bag. Once completely naked, the arrestee is instructed to bend over and spread their butt cheeks so that the deputy may inspect their anus with a flashlight. If the arrestee is male they are instructed to lift their penis and testicles so that the deputy may inspect them. The arrestee is then told to open their mouth so the deputy may look inside and then run their fingers through their hair.

computerized information systems which will allow categorization by date, offense, and pre-arraignment status (as well as the identification) of the arrestees in each class.

Discovery has been stayed until the present time because the pendency of Defendants' Motion to Dismiss, which was denied in pertinent part by this Court's Order on May 19, 2009. This Motion is timely under Appendix A of the Local Rules because the Defendants filed their Answer within the last 30 days, on May 29, 2009.

A. Brief Statement Of The Case

The Complaint in this action was filed under the Federal Civil Rights Act, 42 U.S. C. § 1983, on September 8, 2008. This lawsuit arises out of the unconstitutional policies and procedures of strip searching arrestees at the McLennan County Jail in Waco, Texas. The facility is a local jail operated by Defendant McLennan County; the Defendants before the Court, pursuant to the Court's ruling on Defendants' Motion to Dismiss, are McLennan County and McLennan County Sheriff Lynch in his individual capacity. (See, this Court's Order, May 19, 2009.)

Plaintiffs in the present case are two male arrestees who were arrested for driving under the influence and booked at the McLennan County Jail: Plaintiff William Bradshaw, the putative class representative of Class A, was subjected to a strip search upon being booked; Plaintiff Randall Gerik, the putative class representative of Class B, was subjected to a strip search which included a visual body cavity search. (Declarations of William Bradshaw and Randall Gerik, filed herewith.)

Pursuant to Defendants' Motion to Dismiss, this Court has ruled that the strip search of Plaintiffs, as alleged in the Complaint, was a violation of the Fourth Amendment of the U.S. Constitution. (5/19/09 Order, pp. 8-9.)

B. Statement Defining The Proposed Class, Including Geographical And Temporal Scope:

As noted above, Plaintiffs have moved for the certification of two classes of arrestees. The period for class membership extends from September 8, 2006 (two years before the filing of the Complaint) to such time as the unconstitutional custom or policy ceases.

The definition of the class excludes all those who were not arrested for a "minor offense" and makes the class ascertainable. (See, Declaration of Mark E. Merin filed herewith.) As many courts have recognized, and as counsel for Plaintiffs have learned in extensively litigating this issue in other

jails, county jails now routinely rely on computers to record the identity of each arrestee, the date and charge(s) involved in the most recent arrest, the charges involved in each prior arrest, the probationary or parolee status of the arrestee, as well as the date of arraignment or first movement to court. This data can be sorted by offense and by date – a process that results in the exclusion of all those arrested on serious offenses as well as those with a pertinent history of those offenses, and that permits pinpointing of the applicable dates. (Declaration of Mark E. Merin, ¶ 11.)

The types of offenses to be considered “minor” can be negotiated by the parties and/or submitted to the Court for determination. (Declaration of Mark Merin, ¶ 13.) If records are kept, an expeditious file review is sufficient to resolve any further questions in the event such information is not noted in the computer.

C. Description Of Plaintiffs’ Grievance And Why It Qualifies Plaintiffs As Members Of The Class As Defined:

Both Plaintiffs were arrested for driving under the influence – in unrelated instances a year apart in time – and were strip searched at the McLennan County jail. (See, Declarations of Plaintiff Bradshaw and Gerik filed herewith.) Since driving under the influence is a “minor offense,” as verified in this Court’s order, and each was subjected to a strip search, they are members of the class of such “minor offense” arrestees who were subjected to unconstitutional strip searches at the jail. (Order 5/19/09. p. 8.)

D. Appropriateness Of Certification Of The Class Under 23(b)(3):

Under Rule 23 (b) (3), an action may be maintained as a class action if, in addition to satisfying the requirements of Rule 23 (a), the court finds that the questions of law common to the members of the class “predominate” over those affecting individuals members, and that the class action is “superior” to other methods for the “fair and efficient” adjudication of the controversy.

The “predominance” requirement “tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Unger v. Amedisys*, 401 F.3d 316, 320, (5th Cir. 2005.) In strip search cases, the courts have consistently rejected, with few exceptions, the claim that the hypothetical existence of individualized reasons to strip search class members will defeat class certification. *Tardiff v. Knox County*, 365 F.3d 1, 6, (1st Cir. 2004). See, also, *Smith v. Dearborn County*, 244 F.R.D. 512, 519-520 (S.D. Ind., 2007) [Court determined computer data would “provide

all the information necessary to determine if a strip search is supported by individualized reasonable suspicion”: while the Sheriff would have the opportunity to adduce additional facts, “[u]nder this scenario, it is apparent to the court that the class action vehicle will be adequate to resolve this constitutionality issue for each class member.”]; *Jones v. Murphy*, 256 F.R.D. 519, 524-525 (D.Md., 2009) [“because the class was limited to those arrested for misdemeanors or ordinance violations unrelated to weapons or illegal drugs, there likely would not be much evidence of reasonableness”]; *Mitchell v. County of Clinton*, (N.D. N.Y. 2007) 2007 U.S. Dist. LEXIS 48589 *12-13 [class of minor arrestees certified; “the existence of defenses with respect to individual plaintiffs..will concern only a limited number of plaintiffs” and do not foreclose certification]; *Streeter v. Sheriff of Cook County*, (N.D. Ill., 2009) 576 F.R.D. 609, 614 [predominance requirement satisfied where question is whether the Sheriff’s policy avoided all inquiry into reasonable suspicion, rather than whether individualized reasonable suspicion existed]; See also, *Florence v. Board of Freeholders*, 2008 U.S. Dist. LEXIS 22152 *37; *Bizzarro v. Ocean County*, 2009 U.S. Dist LEXIS 48384 *49-50; *Williams v. County of Niagara*, 2008 LEXIS 76206 *12-13; *Bame v. Dillard*, 2008 U.S. Dist LEXIS 40805.

Even causation and damages are, to a great extent, common to the class. Although compensatory damages may vary in amount, the causation and nature of the injury is the same within each class. Indeed, in previous cases, spreadsheets have been used to create “tiers” of damage recovery, setting a specified, standardized amount as the basic compensation and applying “enhancements” based on age, gender, disability, and the like. (Declaration of Mark Merin filed herewith.)

It is well established in the Fifth Circuit that “relatively few motions to certify a class fail because of disparities in the damages suffered by class members.” *Bell Atlantic Corp v. AT & T Corp*, 339 F. 3d 294, 306 (5th Cir 2003.) As the Court observed in *Tardiff, supra*, at the point consideration of damages becomes an issue, “the court would have further options, such as an agreement on modest uniform damages for those not claiming special injury, with masters to determine the (potentially few) serious claims to special injury. E.g, *In re Corrugated Container Anti-Trust Litig.*, 80 F.R.D. 244 (S.D. Tex 1978.).”

In strip search cases where blanket policies are challenged, many courts have come to the conclusion that potential differences in the amount of damages do not defeat class certification. See,

the specific analyses in *Jones v. Murphy*, *supra*, 256 F.R.D at 524-525; *Florence v. Board of Freeholders*, *supra*, 2008 U.S. Dist. LEXIS 22152 *37; *Bizzarro v. Ocean County*, *supra*, 2009 U.S. Dist LEXIS 48384 *49-50; *Bame v. Dillard*, *supra*, 2008 U.S. Dist LEXIS 40805. See also, *Johnson v. District of Columbia*, 248 F.R.D 46 at 57, 2008 U.S. Dist. LEXIS 9069; *Blihovde v. St. Croix County*, 219 F.R.D. 607 at 621, 2003 U.S. Dist. LEXIS 23964; *Mack v. Suffolk County*, 191 F.R.D. 16 at 25, 2000 U.S. Dist. LEXIS 4007.

Moreover, all of these courts have found that class certification is a superior method of resolving challenges to blanket strip search policies on behalf a narrowly defined class, such as the Plaintiffs' classes here, because of the relatively modest individual recoveries, which give the incentive for individual lawsuits, and because the "common classes of law and fact permit the court to consolidate otherwise identical actions into a single efficient unit." *Bynum v. District of Columbia*, 217 F.R.D. 27 at 49, 2003 U.S. Dist. LEXIS 4797.

E. Appropriateness Of Certification As A Class Action Under Rule 23(a);

1. The Anticipated Number Of Class Members And How This Number Was Determined:

As this court is aware, Plaintiffs have not yet had the opportunity to initiate discovery. Therefore, Plaintiffs cannot give more than the most general picture of the numbers of arrestees who will qualify for membership in the two classes Plaintiff seeks to certify. However, it appears to be well in excess of forty members, a number cited in the Fifth Circuit, as well as other Circuits, as the minimum "ball park" number suitable for class treatment. See, *Republic Nat'l Bank v. Denton & Anderson Co.*, 68 F.R.D. 208,213 (N.D. Tex. 1975).

The Texas Commission on Jail Standards website includes a "Jail Population Report," which reflects that 107 persons were confined in the jail under the category "pretrial misdemeanants" in the month of May 2009. (Declaration of Mark E. Merin, ¶ 3, Exhibit A.) Since the class includes all the "minor offenders," as defined above, arrested since September 2005, it appears – as a matter of common sense – that dozens, if not hundreds, of "minor offense" arrestees were strip searched under the Sheriff's blanket policies. In previous jail strip search cases handled by Plaintiffs' counsel, the classes have typically included several thousand individual "minor offense arrestees" strip searched in accordance with blanket policies. (Declaration of Mark Merin, ¶ 4.)

2. The Common Questions Of Law And Fact Involved:

“[T]he threshold for commonality is not high,” *Applewhite v. Reichhold Chemicals, Inc.*, 67 F.3d 571, 573 (5th Cir. 1995), and many of the arguments supporting commonality will also support the typicality requirement. *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993); see also *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993). “The commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *Forbush*, 994 F.2d at 1106; *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997).

As alleged in the First Amended Complaint, there are many questions of fact common to the class, including: (1) whether Defendants routinely subject all persons arrested to visual body cavity searches prior to arraignment if they intend such persons to be housed in the McLennan County Jail; (2) whether persons are subjected to strip and/or visual body cavity searches prior to arraignment without there being any reasonable suspicion, based on specific or articulable facts, to believe any particular arrestee has concealed drugs, weapons, and/or contraband in bodily cavities which could be detected by means of a strip and/or visual body cavity search; (3) whether the strip and/or visual body cavity searches are conducted in an area of privacy so that the searches cannot be observed by persons not participating in the searches; and, (4) whether the strip and/or visual body cavity searches are reasonably related to Defendants’ penological interest to maintain the security of the jail and whether or not there are less intrusive methods for protecting any such interest. (First Amended Complaint, ¶ 23.) In addition, as noted above, the type of injury and causation is common to the class, in that each injury and constitutional violation resulted from strip searches under the challenged policies.

There are also many questions of law common to the class, as alleged in the First Amended Complaint, including, but not limited to: (1) whether Defendants may perform strip and/or visual body cavity searches on persons prior to their arraignment without reasonable suspicion, based on specific or articulable facts, to believe any particular prearrest detainee has concealed drugs, weapons and/or contraband which would likely be discovered by a strip and/or visual body cavity search; (2) whether Defendants may perform strip and/or visual body cavity searches on persons without first reasonably relating the strip search of the subject to Defendants’ penological interest to maintain the security of the jail and determining if there is a less intrusive method to protect that

interest; (3) whether strip and/or visual body cavity searches may be conducted in areas where the searches can be observed by people not participating in the search without violating Plaintiffs' federal constitutional rights; and, (4) whether or not Defendants' strip search policy and procedure is in accordance with the Federal Constitution. (First Amended Complaint, ¶ 24.)

3. The Reasons Why Plaintiffs' Claims Are Typical Of Those Of Other Class Members:

"The test for typicality, like commonality, is not demanding." *Lightbourn*, 118 F.3d at 426, citing *Forbush*, 994 F.2d at 1106. "Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent." *Lightbourn*, 118 F.3d at 424. The typicality requirement is satisfied, as here, when the named plaintiffs advance legal and remedial theories similar to those that would be advanced by class members if they were pursuing parallel actions. *Id.* However, "the two sets of claims need not be completely co-extensive or identical." *Ledet*, 548 F. Supp. at 782.

4. The Reason Why Representation By The Named Plaintiffs Is Adequate To Protect The Interests Of The Class:

i. Whether The Claims Of The Named Plaintiffs Presently Or Potentially Conflict With Those Of Any Members Of The Class:

"The adequacy of representation requirement tends to merge with the commonality and typicality requirement, since an adequate representative's interest and injury must be aligned with the class, and also factors in competency of counsel and conflicts of class counsel." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n. 20 (1997). Here, the claims of the named plaintiffs are identical to those of the class. They do not presently or potentially conflict with those of the class.

ii. Whether The Claims Of The Class Require Subclasses Presently Or In The Future:

Subclasses are not presently required, nor are they likely to be required in the future.

iii. The Prior Experience Of Counsel For Plaintiffs Indicating Their Capability To Handle The Lawsuit:

Plaintiffs are represented by Mark E. Merin of the Law office of Mark E. Merin along with co-counsel, James C. Harrington of the Texas Civil Rights Project, who individually and collectively

have prior experience enabling them effectively to prosecute this action. (See Declarations of Mark E. Merin and James C. Harrington, filed herewith.)

iv. Whether Counsel Is Presently Representing Or Has At Any Time Represented A Class In Any Other Class Action, And If So, When And How Many Instances:

Plaintiffs' counsel are, and have in the past, represented classes in other class action lawsuits. (See Declarations of Mark E. Merin and James C. Harrington, filed herewith.)

v. The Number Of Cases Plaintiffs' Counsel Is Now Handling In Which Class Action Allegations Are Made?

Plaintiffs' counsel are handling various cases in which class action allegations are being made. (See Declarations of Mark E. Merin and James C. Harrington, filed herewith.)

5. Other Pending Actions In Any Court Against Defendants Alleging The Same Or Similar Causes Of Action:

None.

6. Whether The Attorneys For The Named Plaintiffs Have Discussed And Thoroughly Explained To The Plaintiffs The Nature Of A Class Action And Potential Advantages And Disadvantages To The Named Plaintiffs By Proceeding In A Class Action Rather Than Individually:

Yes.

7. Proposed Notices To Class Members And How And When The Notices Will Be Given, Including A Statement Regarding Security Deposit For The Cost Of Notice:

Pursuant to the orders of the Court, Plaintiffs will give notice to class members both by publication, by website, and by first class mail. In handling class actions, Counsel has retained an expert class action administrator and anticipates that this may be appropriate or necessary in this case as well. (Declaration of Mark E. Merin, ¶ 16.) This notice will include information concerning eligibility for class membership (i.e., the period of the statute of limitations and a description of the type of arrest (i.e., a "minor offense" not involving drugs, weapons, or violence) which is a threshold requirement for participation in the class), as well as the contact information of Plaintiffs' counsel and the deadline for filing a claim. If so ordered, Plaintiffs are prepared to submit to the Court a

security deposit amounting to estimated publication costs, mailing costs, and other expenses.

8. The extent of any previous settlement negotiations and the likelihood of settlement with the named plaintiffs on an individual basis:

Settlement with the named Plaintiffs alone is unlikely, because Plaintiffs' individual claims are identical to those asserted on behalf of the class. No settlement discussions have yet occurred.

9. Any other matters necessary and proper to the expedition of a decision on the motion and the speedy resolution of the case on the merits:

None.

III. CONCLUSION

Plaintiffs pray this Court grant Plaintiffs' Motion for Class Certification, certifying the classes as prayed for in this Motion and Proposed Order.

DATED: June 25, 2009

Respectfully submitted,

/s/ - "Mark E. Merin"
By: (Electronically signed 6/25/09)
Mark E. Merin, Esq.
California State Bar No. 43849
Joshua Kaizuka, Esq.
California State Bar No. 212195
LAW OFFICE OF MARK E. MERIN
2001 P Street, Suite 100
Sacramento, CA 95814
Telephone: (916) 443-6911
Facsimile: (916) 447-8336
E-Mail: mark@markmerin.com
joshua@markmerin.com

James C. Harrington, Esq.
Texas State Bar No. 09048500
Scott Medlock, Esq.
Texas State Bar No. 24044783*
Wayne Krause, Esq.
Texas State Bar No. 24032644
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741-3436
Telephone: (512) 474-5073
Facsimile: (512) 474-0726
E-Mail: jch@mail.utexas.edu
scott@texascivilrightsproject.org
waynekrause@texascivilrightsproject.org

Attorney for Plaintiffs and the Class

*Scott Medlock represents only Plaintiff

William Bradshaw, in his individual capacity, not class members

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James C. Harrington, Esq.
Scott Medlock, Esq.
Wayne Krause, Esq.
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741-3436

Michael W. Dixon, Esq.
Herbert S. Bristow, Esq.
HALEY & OLSON, P.C.
Triangle Tower, Suite 600
510 North Valley Mills Drive
Waco, Texas 76710

Robert S. Davis, Esq.
FLOWERS DAVIS, P.L.L.C.
1021 ESE Loop 323, Suite 200
Tyler, Texas 75701

/s/ - "Mark E. Merin"
(Electronically signed 6/25/09)
By: Mark E. Merin