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

WILLIAM ROBERT BRADSHAW,	§	
and RANDALL LEE GERIK,	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. W-08-CV-246**
	§	
	§	
McLENNAN COUNTY; et al.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs' Motion for Class Certification. Having reviewed the Motion, Response, Reply, and applicable legal authority, the Court finds that the Motion lacks merit and should be denied.

On or about June 1, 2007, Plaintiff William Robert Bradshaw was arrested for driving under the influence of alcohol. The arresting officer took Plaintiff to the McLennan County Detention Center where Plaintiff was subjected to a visual body cavity search, which is better known as a strip search. This strip search was allegedly performed prior to any appearance before a judge and without individualized reasonable suspicion that Plaintiff was concealing weapons or contraband.

On or about May 3, 2008, Plaintiff Randall Lee Gerik was arrested for driving under the influence of alcohol. Like Bradshaw, Gerik was arrested and taken to the McLennan County Detention Center where he was strip searched, and subjected to a visual body cavity search. Gerik alleges that said search was conducted without

a reasonable suspicion that he was concealing contraband or weapons.

Plaintiffs allege that the Sheriff's Deputies who conducted the strip search did so pursuant to established policies of the McLennan County Sheriff's Office. Plaintiffs further allege that the McLennan County Sheriff's Deputies routinely follow the policy of strip searching pre-arraignment detainees without having an individualized reasonable suspicion that such a search would be productive of weapons or contraband.

On January 27, 2009, McLennan County, McLennan County Sheriff's Office, and Sheriff Larry Lynch all moved to dismiss the case. Ultimately, the Court granted in part and denied in part those motions. The result of the Court's Order was that Sheriff Larry Lynch and the McLennan County Sheriff's Department were dismissed from the suit. The Court also found that a strip search of a person arrested for driving under the influence of alcohol, without reasonable suspicion that the search would produce contraband, was a violation of the constitution.

From the date of the filing of this suit, Plaintiffs have expressed their desire to proceed on behalf of similarly situated persons–as a class action suit. After the Court ruled on the defendants' motions to dismiss, Plaintiffs sought class certification. Plaintiffs claim that this case meets all the requirements of Federal Rule of Civil Procedure 23, which determines whether class certification is appropriate. Defendant McLennan County ("Defendant") disagrees and argues that several of the Rule 23 requirements have not been met.

A court has substantial discretion in the determination of whether an action should be certified as a class action. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 601 (5th Cir. 2006). The Court must, however, "conduct a rigorous analysis of the rule 23 prerequisites before certifying a class." *Id. (*citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)). In this analysis, the burden of proof lies on the party seeking certification. *Steering Comm.*, 461 F.3d at 601.

The Court begins its analysis by looking to Rule 23 of the Federal Rules of Civil Procedure. That rule enumerates the requirements for certifying a class action suit. The rule states that members of a class

> may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). These four requirements have been called numerosity, commonality, typicality, and adequacy. If the requirements of 23(a) are met, a class action may be maintained in three situations. FED. R. CIV. P. 23(b). Plaintiffs seek certification of the proposed class under the third situation enumerated in Rule 23(b)(3). That subsection allows for certification of a class if "the court finds that the questions of law or fact common to class members predominate over any questions

affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3).

Numerosity

The Court must first determine whether the proposed class is "so numerous that joinder of all members is impracticable." 23(a)(1). Plaintiffs must show some evidence or a reasonable estimate of the number of purported class members. *James v. Dallas*, 254 F.3d 551, 570 (5th Cir. 2001). In *James*, the Court found that the plaintiffs had met their burden of proving numerosity by alleging that there were more than 100 class members. *Id.* The plaintiffs in *James* relied on an estimate that 580 individuals were affected by the defendant's actions. *Id.*

In the case before the Court, Plaintiffs rely on a Jail Population Report for the McLennan County Jail to support their claim that the numerosity requirement is met. That report shows that approximately 107 "pretrial misdemeanants" were confined in the McLennan County Jail in May, 2009. Using this number, counsel for Plaintiffs estimates that "dozens, if not hundreds, of 'minor offense' arrestees were strip searched under the Sheriff's blanket policies." (Pls.' Mot., 6) To arrive at that conclusion, however, it appears that Plaintiffs' counsel assumes that each of these "pretrial misdemeanants" fits into one of the two classes enumerated by Plaintiffs and that those 107 persons were arrested in the month of May. With those assumptions, Plaintiffs' counsel extrapolates the number over a 2 year period and

concludes that hundreds, if not thousands, of class members exist.

While Plaintiffs' counsel could be correct in his calculations, the Court does not believe he has met his burden of proving that the numerosity requirement is satisfied. Plaintiffs' counsel informs the Court that, because the case is in such an early stage, he would benefit from additional time to discover information that would help him show that the Rule 23(a) requirements are met. Although the Court finds that Plaintiffs have not proven the numerosity requirement, it is unnecessary to give additional time to Plaintiffs' counsel to prove that requirement, as the predominance requirement, discussed below, precludes the Court from certifying the proposed classes.

Commonality

Next, Plaintiffs must show that there are questions of law or fact common to the class. FED. R. CIV. P. 23(a)(2). The commonality requirement of Rule 23(a) requires there to be factual or legal issues that are common to all or substantially all of the class members. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The "commonality test is met when there is 'at least one issue whose resolution will affect all or a significant number of the putative class members.'" *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993)(citing *Stewart v. Winter*, 669 F.2d 328, 335 (5th Cir. 1982)). "The threshold of 'commonality' is not high." *Jenkins*, 782 F.2d at 472. As long as class members are allegedly affected by a defendant's general policy, and the general policy is the crux or focus of the

litigation, the commonality prerequisite is satisfied. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992), *appeal dism'd without opinion*, 995 F.2d 1066 (6th Cir. 1993).

In the case before the Court, there exist issues whose resolution will affect a significant number of the putative class members. For example, whether Defendant's strip search policy violates the constitution will affect every member of the proposed class. Because there is at least one issue whose resolution will affect a significant number of the proposed class members the commonality requirement of Rule 23(a)(2) is met in this instance.

Typicality

The typicality requirement does not focus as much on the relative strengths of the cases of the named and unnamed plaintiffs as it does on the "similarity of the legal and remedial theories behind their claims." *Jenkins*, 782 F.2d at 472. Typicality requires the plaintiff to show that his claims arise from the same event, practice, or course of conduct that gives rise to the claims of other class members. *Ford v. NYLcare Health Plans*, 190 F.R.D. 422, 426 (S.D. Tex.1999). Moreover, the plaintiff must have the same interest and must have suffered the same injuries as those of the proposed class. *Zachery v. Texaco Exploration and Prod., Inc.*, 185 F.R.D. 230, 240 (W.D. Tex. 1999). This requirement focuses on the similarity of the legal and remedial theories of the named plaintiffs and the class members whom they purport to represent. *Jenkins*, 782 F.2d at 472. Typicality exists when the class

members, were they to proceed in a parallel action, "would advance legal and remedial theories similar, if not identical, to those advanced by the named plaintiffs." *Lightbourn v. El Paso*, 118 F.3d 421, 426 (5th Cir. 1997). In fulfilling this element, plaintiffs or class representatives must possess "the same interests and suffer the same injuries as the proposed class." *Celestine v. Citgo Petroleum Corp.*, 165 F.R.D. 463, 467 (W.D.La. 1995). This requirement, like the commonality requirement, is not overly demanding. *Id*.

In the case before the Court the plaintiffs' legal theories are similar to those of the proposed class. According to Plaintiffs' complaint, Plaintiffs and the proposed class members were arrested for minor offenses and strip-searched pursuant to Defendant's policy. If each member of the proposed class were to proceed to trial separately, he would advance a similar legal theory to that advanced by every other member and claim a similar type of damages for the emotional harm he allegedly suffered. While the extent of the alleged harm would differ greatly among plaintiffs, the type of harm is the same. The Court believes that the low threshold of Rule 23(a)(3) is met in this case.

Adequacy of Representation

Rule 23(a)(4) requires the class representatives and their counsel to "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). To meet this requirement, the class representatives must address two concerns: (1) concerns regarding the qualifications of counsel and (2) concerns regarding the

relationship between the interests of the class representatives and the interests of other class members. *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 273 (E.D. Tex. 1985), aff'd, 782 F.2d 468 (5th Cir. 1986)). The Court must be sure there is an absence of conflict and be assured of a vigorous prosecution. 1 NEWBERG ON CLASS ACTIONS § 3.22, at 3-126.

Plaintiffs argue that the legal claims of the representative plaintiffs are identical to the claims of the proposed class members.[1] This situation, however, presents a unique dilemma. The proposed class includes "minor offenders." Both parties recognize that there is a grey area where crimes could fall on either the minor or major side of the equation. While the determination of membership of the class is addressed later, the parties' discussion in their response and reply demonstrates a problem with the proposed class representation.

In its response, Defendant asks whether certain crimes create a reasonable suspicion for a strip search. Defendant uses arson, indecency with a child, terroristic threats, abuse of prescription drugs, parole violations for violent crimes, bringing contraband into an institution, and escape or evading arrest as examples. In response, Plaintiffs concede that such crimes do create reasonable suspicion. By conceding this point, however, Plaintiffs' attorneys have created a conflict between those proposed class members who are clearly minor offenders, and those proposed

[1]As discussed below, the extent of damages differs greatly. For the purposes of the instant analysis, however, the extent of each class member's damages does not affect the adequacy of the named plaintiffs' representation.

class members who are arguably minor or major. For instance, an arson arrestee could argue that his crime does not create a reasonable suspicion for a strip search. But that arrestee's proposed representative has already conceded this point, precluding the arrestee's interests from being represented in this case. Plaintiffs have an obvious interest in maintaining this lawsuit, and the potential class members have an interest in being a part of the class. However, Plaintiffs' interests may be best served by conceding points that effectively preclude litigation of whatever claims those would-be class members have. Because the plaintiffs interests may be in conflict with those of the proposed class members, a conflict between the representative parties and the proposed class members may exist.

The second part of the adequacy query favors class certification. Plaintiffs' counsel appears to be experienced in litigating the same issues presented in this lawsuit in several different jurisdictions. Counsel's qualifications appear adequate to protect the interests of the named plaintiffs and the proposed class members.

Although the Court is not convinced that Plaintiffs have met the four requirements of 23(a), the Court will now determine whether "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3). The analysis of whether certification under Rule 23(b)(3) is appropriate has devolved into two main inquiries: whether common issues predominate over individual issues and

whether the class action is a superior adjudicatory scheme for resolution of the legal and factual claims raised by the plaintiffs.

The Predominance Inquiry

The predominance inquiry involves a comparison of the issues common among the class members and the issues individual to them. This inquiry is far more demanding than the "commonality" requirement of Rule 23(a). *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997). The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). The cohesiveness of a class deteriorates when the plaintiffs seek compensatory damages.

> The very nature of these damages, compensating plaintiffs for emotional and other intangible injuries, necessarily implicates the subjective differences of each plaintiff's circumstances; they are an individual, not class-wide, remedy. The amount of compensatory damages to which any individual class member might be entitled cannot be calculated by objective standards. Furthermore, by requiring individualized proof of discrimination and actual injury to each class member, compensatory damages introduce new and substantial legal and factual issues.

Allison, 151 F.3d at 417. Claims for compensatory damages, then, must be placed on the "individual" side of the equation, counseling against a finding of predominance. To do otherwise would allow a class action to "degenerate in practice into multiple lawsuits separately tried." *Castano*, 84 F.3d at 745 n. 19 (citing FED. R. CIV. P. 23 (advisory committee notes)).

In the case before the Court, Plaintiffs seek damages for "distress, anguish, suffering, humiliation, deprivation of constitutional rights, and other incidental, consequential, and special damages." (Pls.' Am. Compl. ¶ 45) As stated by the Fifth Circuit in *Allison*, "in this circuit, compensatory damages for emotional distress and other forms of intangible injury will not be presumed from mere violation of constitutional or statutory rights. Specific *individualized* proof is necessary . . . ." *Allison* at 416-17. In this case, the circumstances of each allegedly-unlawful search would have to be presented to the Court or jury. The potential amount of damages for a plaintiff strip-searched "in an area that could be and was observed by persons . . . who were of the opposite sex," (Pls' Am. Compl. ¶ 14), might differ from the damages for a person strip-searched in a private room, out of sight of members of the opposite sex. Even if two class members were subjected to the very same strip-search, with the very same surrounding circumstances, after having been arrested for the very same crime, their damages would likely differ as a result of the "subjective differences of each plaintiff's circumstances." *Allison* at 417. While one class member may be severely affected, another may not have suffered any embarrassment or emotional harm from the circumstances. The Court or the jury would have no way of determining damages without presentation of each class member's personal injuries. The resultant series of mini-trials is the very harm Rule 23(b) is designed to prevent with its predominance inquiry.

Regardless of Plaintiffs' desire to characterize the situation as "putative class

members all strip searched pursuant to a blanket jail strip search policy," each strip-search was a separate event, with differing circumstances for each one. In this respect, the facts of this case are similar to those in *Allison*. *Allison*, 151 F.3d 402. Because of the predominance of individualized issues, this case is not proper for class certification.

Superiority

Next the Court must determine whether the class action method of handling this case is superior to other available methods. There are several factors in this case that tip the scale against class certification. Primarily, the nature of Plaintiffs' claims and the effect of the Court's Order on Defendant's earlier Motion to Dismiss make the class action vehicle inferior. In the Court's earlier Order, the Court found that "the strip search of a driving under the influence of alcohol arrestee without a reasonable suspicion that the strip search will yield contraband or weapons is a constitutional violation." (Court Doc. No. 21, Order on Defendant's Mot. to Dismiss, 9) The Court's analysis in that Order also made clear that a strip search of "minor offenders" was equally in violation of the constitution. By so ruling, the Court has addressed the greatest of the class-wide issues in this case. The remainder of the case, then, will involve Plaintiffs' proof of the occurrence of the strip-search and the circumstances surrounding each search, the County's presentation of any evidence it may have of individualized reasonable suspicion, and Plaintiffs' presentation of evidence of individualized damages. The class action suit is not the superior method

of handling this case.

Ascertainability

As Defendant properly notes, a pre-requisite to any certification is that the class must be ascertainable. *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970). In the *DeBremaecker* case, the Fifth Circuit Court of Appeals held that a purported class of "residents of this State active in the 'peace movement' does not constitute an adequately defined or clearly ascertainable class." *Id.* In affirming the district court's denial of class certification, the Fifth Circuit relied, in part, on the "patent uncertainty" of the term peace movement. *Id.*

As in *DeBremaecker*, the proposed class definition here involves terms so uncertain that it makes ascertaining the class difficult. Namely, defining the class as persons arrested for "minor offenses" would require the Court to determine which offenses fall into the category of "minor." In many cases, such a delineation would be simple. As Defendant points out, however, there are a number of crimes that present a more difficult question to the Court. If the parties were to agree on which crimes were minor versus which were major, the issue would still not be resolved. By negotiating the composition of the proposed classes, counsel for the plaintiffs and the class they represent would be forced to guard the interests of those class members who clearly fall into the "minor offense" category while negotiating away the claims of other potential class members whose crimes are not clearly minor or major, as discussed above.

Plaintiffs also propose that the classes in the case before the Court be defined, in part, as those arrestees who were strip-searched "without any individualized reasonable suspicion that the persons searched were concealing contraband." (Pls.' Mot. 2) In order to determine class membership, then, the Court would have to determine whether each proposed class member was strip-searched without individualized reasonable suspicion. This would, once again, result in a series of mini-trials that Rule 23 was created to prevent.

Even if the claims in this cause of action met the four requirements of Rule 23(a), the difficulty in ascertaining the class and the predominance of individual factual issues make class certification inappropriate. Accordingly, it is

ORDERED that Plaintiffs' Motion for Class Certification (Court. Doc. No. 26) is **DENIED**.

SIGNED on this 30th day of October, 2009.

Walter S. Smith, Jr.

WALTER S. SMITH, JR.
CHIEF UNITED STATES DISTRICT JUDGE