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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARSIAL LOPEZ, individually, and as class representative,

Plaintiffs,

vs.

SHERIFF DONNY YOUNGBLOOD, individually and in his official capacity; FORMER SHERIFF MACK WIMBISH, in his individual capacity, COUNTY OF KERN, a governmental entity; KERN COUNTY SHERIFF'S DEPARTMENT, a California public entity; and DOES 1 through 100,

Defendants.

_____/

Case No. 07-0474 LJO DLB

DEFENDANTS' JOINT MOTION FOR SUMMARY ADJUDICATION REGARDING COURT RETURNEES, QUALIFIED IMMUNITY AND ELEVENTH AMENDMENT IMMUNITY

Date: **December 19, 2008**
Time: **9:00 a.m.**
Ctrm: **9**

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Statutes

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Defendants SHERIFF DONNY YOUNGBLOOD, FORMER SHERIFF MACK WIMBISH, COUNTY OF KERN and its agency the KERN COUNTY SHERIFF'S OFFICE (incorrectly named as KERN COUNTY SHERIFF'S DEPARTMENT) hereby jointly move for summary adjudication and submit the following memorandum of points and authorities in support thereof.

I.

INTRODUCTION

In this second Motion for Summary Adjudication, Defendants move for judgment regarding the claims of certain Plaintiffs, who contend that their constitutional rights were violated when they were subjected to strip searches after returning to the jail following a court appearance in which they were ordered by the court to be released. Similar to the other searches in this case that Plaintiffs have challenged, the undisputed evidence relevant to this motion clearly establishes that the searches of these Plaintiffs upon their return to the jail from an outside, unsecure setting was reasonable and appropriate in light of the security needs related to having to place the detainees back in the jail's general population for holding during the delay between the time the detainees were returned to the jail and when the jail finally received the court order directing their release from custody.

Defendants also move for judgment on behalf of individual Defendants Youngblood and Wimbish. Defendants maintain their position, as stated in their first Motion for Summary Adjudication, that searching post-arraignment detainees in small groups does not violate Plaintiffs' rights under the Fourth and Fourteenth Amendments, nor do these searches violate the Equal Protection Clause simply because California law prohibits similar searches from being conducted as to pre-arraignment arrestees. However, to the extent that any question may exist as to the constitutionality of these security-based practices, Defendants Youngblood and Wimbish are immune from liability because the law is not clearly established that such practices violate constitutional rights.

Finally, Defendants' motion also pertains to the status of the Sheriff as a State actor with respect to the searches of detainees whom the court has ordered to be released. The actions at issue in this lawsuit are directly tied to the statutory mandate the State has issued to the Sheriff as to enforce the laws of the State of California. Moreover, in holding these inmates, the Sheriff acts on

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behalf of the State of California because he is beholden to the Superior Court in awaiting its disposition of each detainee's case. In so doing, the Sheriff stands in place of the State of California in maintaining custody of these detainees such that he is immune from suit in this matter pursuant to the Eleventh Amendment. Because the Sheriff is a state actor, none of the actions at issue in regard to this particular putative class can be attributed to the County and therefore the County should be dismissed from this action in that regard as an improper party.

Based upon the clear evidence and legal precedent discussed herein, Defendants respectfully request that their Motion for Summary Adjudication in regard to these enumerated issues be granted.

II.

FACTS

Inmates housed at the Lerdo facility of the Kern County Jail ("jail") are required to be transported to one of the Kern County Superior Court locations to appear regarding the criminal charges against them. See Defendants' Joint Separate Statement of Undisputed Material Facts (UMF), UMF 1. Hundreds of inmates are transported to court each day from the Lerdo facility. UMF 2. Sometimes at a court appearance, the court orders that the inmate should be released. UMF 3. Reasons for the release may include release on the inmate's own recognizance, posting bail or complete dismissal of the criminal charges. UMF 4. However, when the court orders the inmate to be released, it does so only on the matter or matters before it. UMF 5. In other words, the court does not consider other reasons or cases that the inmate may be in custody. UMF 6. Therefore, an order of release does not necessarily mean that the inmate may be released from custody at that time. UMF 7.

When the court issues an order of release, the clerk of the court enters the court's order into the local computerized Criminal Justice Information System ("CJIS"), as well as the reason for the order of release. UMF 8. The clerk may enter the order at any time before the end of the clerk's work day. UMF 9. Almost always, the inmate has returned to the Lerdo facility before the clerk has entered the order into CJIS. UMF 10. The Detention Deputies who transport the inmates to and from the court are not aware of the court's orders regarding release because they do not provide courtroom security. UMF 11. After the clerk enters the information, CJIS creates a "flag" on the inmate's CJIS

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record. UMF 12. However, for jail staff to locate the flag, they must run a C,JIS search to pull the records with the specific, court-entered flag. UMF 13. Generally, jail staff runs the report hourly to determine which of the inmates have a flag that indicates that the court has ordered the inmate to be released on the charge on which the inmate appeared. UMF 14.

Once jail staff runs the CJIS search for the inmates ordered released by the court, each of these inmate records must be checked to determine whether there are other reasons for the inmate to remain in jail. UMF 15. Reasons for holding the inmates after a court-ordered release on a particular criminal case may include the existence of other ongoing criminal cases, holds or warrants. UMF 16. To conduct this check, the local CJIS system must be searched, as well as the statewide computer system, the California Law Enforcement Telecommunications System (known as "CLETS"). UMF 17. If it is determined that there is no other basis for the inmate to be retained in the jail, then the inmate is released. UMF 18.

Because of the time delay between the inmates' return from court and the court clerk's entries of the release orders, there was no way for the custodial staff to know which of the inmates were going to be released following to their appearances in court. UMF 19. Moreover, there was no way for the jail custodial staff to know which of those inmates that were ordered to be released would not, in actuality, be eligible for release. UMF 20. As a result, inmates returning from court had to be re-housed in the jail. UMF 21. Inmates had to be re-housed at the jail for numerous reasons. As stated, there was no way to know at the time that the inmates returned to Lerdo from their court appearances who would ultimately be released from custody. UMF 22. In addition, the Lerdo facility has no way to temporarily segregate and house the large number of inmates who are transported to and from court each day. UMF 23. To segregate and temporarily house the inmates returning from court, the Lerdo facility would have to have sufficient holding cells for each classification of prisoner because inmates of different housing classifications cannot be held together; commingling of different classifications poses a safety risk to the inmates and a threat to the internal security of the facility. UMF 24. For example, members of opposing gangs cannot be housed together due to the likelihood of ensuing violence. UMF 25. Even commingling inmates of the same classification in close quarters for the amount of time that is required to determine whether an inmate may be released from

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custody poses the potential for a violent exchange between inmates, which is a serious threat to the jail. UMF 26. In addition, as explained in Defendants' first motion, there is insufficient jail staffing to provide even the minimum amount of security necessary for any such "temporary" housing unit. UMF 27.

When the inmates were transported to and from the court, they had contact with other inmates from their jail unit, other units and other Lerdo facilities on the transport bus and while at the courthouse.[1] UMF 28. Given the amount of contraband that the jail's custodial officers find, they have reasonably concluded that the contraband is largely obtained as a result of the contact with other inmates during the court transports. UMF 29. For example, inmates somehow obtain portions of latex gloves, in particular the fingers of the gloves, and use the latex to envelop contraband. UMF 30. Inmates commonly place the contraband in their rectums for transport back to the Lerdo facility. UMF 31. However, inmates also hide contraband in or on other areas of their bodies while at court. UMF 32. For example, in a widely publicized incident in 2007, convicted mass-murderer Vincent Brothers managed to secret a fabricated handcuff key in his hair during a visit to court. UMF 33. This key was discovered during a strip search of his person. UMF 34. This example serves to illustrate that because of contact between inmates, it was necessary to strip searched the inmates upon their return to the jail prior to being re-housed. UMF 35.

III.

LEGAL STANDARD

If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, then the court must make an order granting the movant's motion for summary judgment. Fed. R. Civ. P. 56(c).

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986).

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[1]As explained in Defendants' first Motion for Summary Adjudication, the Lerdo jail is divided into four different facilities.

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Once a movant's initial burden is met, the burden shifts to the opponent, who must then produce specific facts beyond the pleadings and show the existence of genuine disputes of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). The opposing party cannot establish disputed material facts by relying on allegations in his or her pleadings, but must tender admissible evidence showing the genuineness of the dispute regarding material issues. Depoali v. Carlton, 878 F.Supp. 1351, 1357 (E.D. Cal. 1995). Summary judgment should be granted "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, set forth in Rule 56(c) is satisfied." Celotex, 477 U.S. at 323.

The moving party need not present any evidence on those matters where the opposing party will have the burden of proof at trial. Id. at 325. With respect to claims for which the opposing party bears the ultimate burden of proof, the moving party's burden is met by demonstrating the absence of evidence supporting the opposing party's claim. Id. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id. at 322. To demonstrate a genuine issue, the opposing party,

> must do more than simply show that there is some metaphysical doubt as to the material fact ... where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Matsushita, 475 U.S. at 586.

IV.

THE CONSTITUTIONAL CLAIMS OF THE PUTATIVE CLASS OF COURT RETURNEES WHO ARE SEARCHED MUST FAIL BECAUSE PLAINTIFFS CANNOT PROVE THE EXISTENCE OF A CONSTITUTIONAL VIOLATION UNDER *MONELL*

The County of Kern is not liable for the actions of its employees which result in violations of constitutional rights unless the conduct is pursuant to an official government policy or custom. Monell v. Dept. of Social Services 436 U.S. 658 (1978); *see* Pembaur v. City of Cincinnati 475 U.S. 469 (1986). Municipal liability under § 1983 can only be established where the plaintiff shows that (1) he was deprived of his constitutional rights; (2) the municipality has a policy; (3) the policy amounts to deliberate indifference to plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. City of Canton v. Harris 489 U.S. 378, 389-91 (1989); *see*

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Oviatt v. Pearce 954 F.2d 1470, 1474 (9th Cir. 1992) (*quoting* Canton and analyzing Monell liability). However, where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of a municipality and the causal connection between the "policy" and the constitutional deprivation. McMillian v. Monroe County 520 U.S. 781, 823-24 (1997).

"[W]here exposure to the general public presents a very real danger of contraband being passed to a detainee, a policy of strip searching the detainees upon their return from the courthouse and prior to their being placed back in the general population of the detention center is both justified and reasonable." Richerson v. Lexington Fayette Urban County Govt. 958 F.Supp. 299, 307 (E.D. Ky. 1996). "The 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 was conducted." Bell v. Wolfish 441 U.S. 520, 559 (1979). It is well-established that it is appropriate to search inmates when they return from anywhere that is outside the secure setting of the detention facility. See Powell v. Barrett 541 F.3d 1298. 1313 (11th Cir. 2008) (en banc) (observing that, if a detainee had "been strip searched after contact visits ... their claims would not have a prayer of surviving even the most cursory reading of Bell.").

Plaintiffs cannot establish that they sustained any violation of their constitutional rights with respect to Plaintiffs' proposed class regarding those prisoners who appear in court, are ordered released by the court and are returned to the jail, where they are strip searched. Neither the corrections officers escorting the detainees to and from the courthouse nor the officers stationed in the jail facility know whether a detainee has been ordered released at the time the detainee returns to the jail, requiring that the returning detainees are placed back into jail general population until further information is received later in the day. As established in Defendants' first motion for summary adjudication, the Kern County jail is full and the inmate-to-staff ratios have become increasingly imbalanced; further, space in the jail is extremely limited. The jail has concluded that its best option to maintain immediate security needs is to place all prisoners back into the general

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population until proper notification of release is received from the court. Because the prisoners will be sent back to general population, internal security needs mandate that all inmates be searched so that contraband is not introduced into the facility. Indeed, it is only appropriate and necessary that all inmates returning to the jail be strip searched before they are placed back into the general population. This is the only means by which Defendants can locate any of the contraband that undisputedly exists and which the inmates may have obtained while outside the facility and prevent it from being passed to other detainees within the jail. Accordingly, pursuant to Bell, the search is reasonable and does not violate the constitutional rights of the inmates as a matter of law. Whereas Plaintiffs cannot establish the existence of a constitutional violation, their claims against the County must fail as a matter of law. See City of Los Angeles v. Heller 475 U.S. 796 (1986) (per curiam). Therefore, Plaintiffs' claim in this regard fail and the City is entitled to judgment as a matter of law in regard to the § 1983 claims asserted against it. Thus, pursuant to Monell, the County requests that its motion in regard to the court-returnee class be granted.

V.

THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY AS TO PLAINTIFFS' CONSTITUTIONAL CLAIMS

Qualified immunity is not merely a defense to liability but an immunity from suit. Swint v. Chambers County Common 514 U.S. 35, 42 (1995); Mitchell v. Forsyth 472 U.S. 511, 526 (1985). Public officials are entitled to qualified immunity for acts that do not violate "clearly established . . . constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald 457 U.S. 800, 817-18 (1982); Rivero v. City & County of San Francisco 316 F.3d 857, 863 (9th Cir. 2002). When considering a defendant's motion for summary judgment on the ground of qualified immunity, the court first must determine whether the official's conduct violated a constitutional right. Saucier v. Katz 533 U.S. 194, 201 (2001).[2] If so, the court next must consider whether the right claimed to be violated was clearly established at the time of the allegedly improper act. Id. If

[2] "A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." County of Sacramento v. Lewis, 523 U.S. 833, 842 n. 5 (1998) (quoting Siegert v. Gilley, 500 U.S. 226, 232 (1991)).

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the right was clearly established, then the court must then inquire whether, despite this fact, the official's unconstitutional conduct was a reasonable mistake of fact or law. Id. at 199. If so, then summary judgment must be granted on the grounds of qualified immunity.

A right is "clearly established" for qualified immunity purposes when the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Saucier, 533 U.S. at 202. To determine whether qualified immunity applies, the court must consider the application of the right in the specific context in question. See Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1087 (9th Cir. 2008); Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 977 (9th Cir. 1998). In other words, "in the light of pre-existing law the unlawfulness *must be apparent*." Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citations omitted) (emphasis added). Thus, in order to find that the law was clearly established, the court must "determine whether the preexisting law provided the defendants with 'fair warning' that their conduct was unlawful." Id. at 741 (citations omitted).

A. Defendants Youngblood and Wimbish are Entitled to Qualified Immunity in Regard to the Issue of Group Searches

1. Qualified immunity should be applied to the Fourth Amendment claims specific to the group searches.

In their first Motion for Summary Adjudication, Defendants moved for judgment with respect to all claims of the putative class pertaining to strip searches of post-arraignment detainees in small groups. In that Motion, Defendants noted that there is no clearly established case law that specifically proscribes the use of group strip searches of post-arraignment detainees.[3] Indeed, in their Opposition to that Motion, Plaintiffs were unable to identify *any* case that specifically prohibited group searches of post-arraignment detainees. Thus, there is no basis for finding that Defendants' actions were unconstitutional and Plaintiffs' claims in this regard therefore must fail as a matter of law.

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[3]Defendants incorporate by reference their legal arguments and case law cited in their Motion for Summary Adjudication as to the group search issue (Docket No. 37), as well as their Reply (Docket No. 58) to the Opposition to the Motion, as though fully restated herein.

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Assuming *arguendo* the court concludes that group strip searches of post-arraignment detainees may violate the constitution, Defendants are nevertheless entitled to qualified immunity. There is no extant legal precedent that "point[s] unmistakably to the unconstitutionality of the conduct complained of and [is] so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional groups, would be found wanting." Virgili v. Gilbert 272 F.3d 391, 393 (6th Cir. 2001). In fact, a recent case from the Western District of Kentucky specifically granted qualified immunity to individual officers arising out of claims of groups strip searches, finding that there was no clearly established law that would prohibit the searches. Hughes v. City of Louisville 2007 U.S. Dist. LEXIS 23055 (W.D. Ky. 2007);[4] see Booker v. Horton 2005 U.S. Dist. LEXIS 15825 (W.D. Ky. 2005) (same); see also Powell v. Barrett supra 541 F.3d 1298 (policy or practice of strip searching, including full body visual searches in group settings, of jail detainees before booking into general population complied with Fourth Amendment as long as search was no more intrusive than the one upheld by the Supreme Court in Bell and did not require a finding of reasonable suspicion that the detainee might be concealing contraband). It is apparent that there is no clearly established law that would have placed Defendants Youngblood and Wimbish on notice that conducting searches of post-arraignment detainees in small groups would violate any aspect of the Constitution. Accordingly, Defendants Youngblood and Wimbish are entitled to qualified immunity in regard to this aspect of Plaintiffs' First Amended Complaint and Defendants therefore request that their motion pertaining to this claim be granted.

2. Qualified immunity should be applied to Plaintiffs' Fourteenth Amendment claims specific to the group searches

As also discussed in Defendants' Motion and Reply, there is no legal support for Plaintiffs' claim that Defendants' practice in search procedures violates the Due Process Clause. As Defendants noted, Bell, 441 U.S. at 535. Bell requires the court to determine whether there was an

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[4]As sometimes happens when a defense of qualified immunity is raised, the district court in Hughes apparently failed to consider the threshold issue of whether the group searches were unconstitutional in the (Footnote 4 cont'd.) first instance. Instead, the court simply concluded that there was no legal precedent to indicate that such searches were impermissible or improper and therefore granted qualified immunity.

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express intent to punish, or "whether an alternative purpose to which [the strip search] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Bell 441 U.S. at 538. Absent evidence of express punitive intent, the Ninth Circuit has noted that "to constitute punishment, the harm or disability caused the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." Demery v. Arpaio, 378 F.3d 1020, 1030 (9th Cir. 2004). Similar to Plaintiffs' Fourth Amendment Claim, there simply are no facts to suggest that any of the Plaintiffs were strip searched as a means for punishment – whether they were searched alone or while in a small group. The rational basis for conducting the strip search is permitted for security concerns as a matter of law. The need for these searches to be conducted as a group in light of the staff constraints proportionate to inmate population. There are no facts to indicate that strip searching inmates in front of other inmates was punishment, nor can it be said that the group searches significantly exceed the inherent discomforts of confinement. Therefore, because there is no constitutional violation of Plaintiffs' rights, no further legal inquiry is necessary for purposes of qualified immunity. See County of Sacramento v. Lewis, *supra*.

Assuming *arguendo* the Court determines that a question exists as to whether a constitutional violation occurred in conjunction with the group searches, Defendants Youngblood and Wimbish also are entitled to qualified immunity in regard to this claim. Again, as with Plaintiffs' Fourth Amendment claim, there is no clearly established law that would have placed these Defendants on notice that performing the searches in small groups would violate the Fourteenth Amendment rights of their prisoners. There is no clear legal precedent that would have indicated to Youngblood and Wimbish that small-group searches significantly exceeded or were independent of the "inherent discomforts" of confinement. Demery 378 F.3d at 1030. Without such clear legal directives, notice of any wrongdoing cannot be imputed to these Defendants and they therefore are entitled to qualified immunity as a matter of law.

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3. Defendants Youngblood and Wimbish are entitled to qualified immunity in regard to Plaintiffs' equal protection claims

In their first Motion for Summary Adjudication, Defendants addressed Plaintiffs' contention that the treatment of post-arraignment detainees as compared to pre-arraignment arrestees with respect to strip searches violated the Equal Protection Clause. In that regard, Plaintiffs never asserted assert that Defendants violated Section 4030, nor can they do so. Indeed, Section 4030 applies only "only to prearraignment detainees arrested for infraction or misdemeanor offenses." Cal. Penal Code § 4030. Section 4030 was enacted to regulate booking searches – a fact which Plaintiffs failed to refute or even address in their Opposition to Defendants' Motion. As stated in Defendants' prior Motion, the undisputed evidence establishes that only post-arraignment prisoners were ever subjected to strip searches, whether alone or in a group; because Section 4030 applies only to arrestees who are strip searched prior to arraignment, the claims asserted by Plaintiffs or any party they purport to represent as part of a class in this regard fails as a matter of law. Moreover, as Defendants noted in their first Motion, Plaintiffs have failed to establish the fundamental legal requirements to support an Equal Protection claim: post-arraignment detainees are not similarly situated to pre-arraignment arrestees and any differential treatment was not based on their membership in a legally protected class. Finally, Defendants clearly demonstrated that any group searches survive rational basis review and do not violate the detainees' constitutional rights.

However, assuming *arguendo* the court concludes that a constitutional violation may exist as to any differential treatment, Defendants Youngblood and Wimbish are entitled to qualified immunity with respect to Plaintiffs' Equal Protection Clause claim. It was not and is not clearly established that differentiating search procedures and practices between pre-arraignment arrestees and post-arraignment detainees is unconstitutional or otherwise improper. In fact, the California State Legislature established the basis for any difference in treatment between these two groups when it enacted California Penal Code Section 4030, which, by its plain language applies to and provides protections only to pre-arraignment misdemeanant arrestees. Section 4030 has never been declared unconstitutional and therefore Defendants reasonably and justifiably relied on the distinctions between prisoner groups provided for therein. Moreover, there is no legal precedent that would have

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placed Defendants notice that such differentiation in searches was unconstitutional. Without any clear legal guideposts to define these parameters, Defendants Youngblood and Wimbish are entitled to qualified immunity as a matter of law and therefore request that their motion in this regard be granted.

B. Defendants Youngblood and Wimbish Are Entitled to Qualified Immunity Regarding the Searches of Detainees upon Return from Court Appearances after They Were Ordered Released

Assuming *arguendo* the court finds a question of fact as to whether the searches of the returning detainees is constitutional, Defendants Youngblood and Wimbish nevertheless are entitled to qualified immunity. There is no clearly established case law that would have placed Youngblood and/or Wimbish on notice that this protocol was in any way unconstitutional. All relevant case law reflects that searches of inmates returning to a detention facility from outside its secure setting are reasonable as a means of preventing introduction of contraband into the facility. Moreover, there is no clearly established law that requires that a detention facility know the status of detainees returning from court or that they somehow be segregated and held indefinitely until their status is conclusively determined. Without any applicable legal requirements stating that the established practices of the KCSO are unconstitutional, Defendants Youngblood and Wimbish had no way to know that their policies would violate clearly established law. Thus, these individual Defendants respectfully submit that they are entitled to qualified immunity as a matter of law and request that their Motion be granted with respect to all claims regarding the searches of detainees returning from court who have been ordered released.

VI.

THE SHERIFF IN HIS OFFICIAL CAPACITY IS A POLICYMAKER FOR THE STATE OF CALIFORNIA, NOT THE COUNTY OF KERN, AND THUS IS IMMUNE FROM SECTION 1983 LIABILITY PURSUANT TO THE ELEVENTH AMENDMENT

A. The California Constitution, California Law and the Judicial Interpretation Thereof by California Courts Support the Conclusion That, in this Instance, the Sheriff in His Official Capacity Acts on Behalf of the State of California

Under federal law, only persons acting under color of state law are liable for civil rights violations under § 1983. A state is not a "person" who may be sued under § 1983; likewise,

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individuals in their official capacities and agencies that are considered "arms of the state" are not persons within the meaning of §1983. Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 (1989). Determining whether an entity is a person for purposes of Section 1983 liability is based upon an examination of state law. Hyland v. Wonder, 117 F.3d 405, 413 (9th Cir. 1997). Here, the Sheriff of Kern County, (currently Defendant Donny Youngblood) is sued in his official capacity.[5]

In McMillian v. Monroe County, *supra*, the United States Supreme Court reaffirmed that state government actors cannot be liable under § 1983. The essential principals for proper adjudication of this issue are: 1) "whether local governmental officials are final policy makers for the local government in a particular area or in a particular issue"; and, 2) whether the identified policymakers represent the local governmental entity or whether they represent the State when acting in that area. 520 U.S. at 783. The McMillian Court also reaffirmed that the question of whether a particular official has that final policymaking authority is dependent upon an analysis of state statute and interpretive legal precedent. Id. at 784.

Here, as in the Alabama State Constitution at issue in McMillian, the Constitution and laws of the State of California support the conclusion that in this instance, the Sheriff is an actor representing the State. See Venegas v. County of Los Angeles , 32 Cal.4th 820, 839 (2004) ("following the analysis prescribed in McMillian ..., California sheriffs act as state officers while performing state law enforcement duties[.]"). The California Constitution mandates that the State Attorney General has oversight of the Sheriff and ultimate power to direct and supervise the Sheriff of each county. Venegas, 32 Cal.4th at 830-33. In addition, the California Government Code also warrants that Sheriffs are State actors for purposes of Monell liability evaluation. California Government Code Section 12560 states, in pertinent part:

> The Attorney General has direct supervision over the Sheriffs of the several counties of the State, and may require of them written reports concerning the investigation, detection and punishment of crime in their respective jurisdiction.

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[5]Plaintiffs do not sue former Sheriff Wimbish in his official capacity. However, since the contested policies occurred under both Sheriff Youngblood and Sheriff Wimbish, the cited law would be equally applicable to both Defendants in their official capacities.

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California Government Code Section 12524 provides:

> The Attorney General may, from time to time, and as often as the occasion may require, call into conference the District Attorneys and Sheriffs of the several counties . . . for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this State as contemplated by Section 13 of Article V of the Constitution of this State.

See California Const. Art. V, §13; Pitts v. County of Kern, 17 Cal.4th 340, 358 (1998) (quoting same); Venegas, 32 Cal.4th at 833-34.

State law imposes on Sheriffs in California the duty to enforce the criminal laws of the State (see Cal. Govt. Code §§ 26600, 26601, 26602) and, relevant to this matter, to "take charge and be the sole and exclusive authority to keep the county jail and the prisoners in it." Cal. Govt. Code § 26605. "Except in rare instances, the [county] board of supervisors has no direct authority over the jail, and even where direct authority is given, its exercise is made discretionary by statute. The only clear and present duty enjoined by law upon a board of supervisors with regard to a county jail is to provide the sheriff with food, clothing and bedding for prisoners and to pay as a county charge other expenses incurred in the keeping of prisoners." Brandt v. Board of Supervisors, 84 Cal.App.3d 598, 601 (1978); see Cal. Penal Code § 4015; Cal. Govt. Code § 29602. Moreover, a board of supervisors has no legal authority to use its budgetary power to control employment in or operation of the sheriff's office; only the sheriff has control of and responsibility for distribution and training of personnel and the specific use of the funds allotted to him. Brandt, at 602.

Examination of state law enforcement hierarchy reveals that, as in McMillian, California Sheriffs and District Attorneys are subject only to the California Attorney General in regard to the official functions of their job in investigating and fighting crime, and thus must be deemed State actors. Venegas, 32 Cal.4th at 839. Accordingly, their actions in performing the functions of their respective positions cannot expose the counties in which they work to liability for alleged violations of § 1983 because a State is not a "person" who is subject to suit under that statute. The California Supreme Court affirmed McMillian in regard to both District Attorneys and Sheriffs in Venegas. The Venegas Court relied upon McMillian and other related state cases in holding that in all matters related to investigation of crime, training of subordinate officers and staff, and options for crime fighting tactics, the County Sheriff acts on behalf of the State in enforcing its laws and thus is a State

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actor. 32 Cal.4th at 830-839. Under McMillian, whether a particular official has policy making authority is dependent upon an analysis of state law; California Constitution, Article V, Section 13, provides that sheriffs and district attorneys are actors of the state, under the supervision of the California Attorney General, which is reinforced by the Venegas Court's decision determining sheriffs to be state actors.

The State of California charges Sheriffs with preserving the peace, "participat[ing] in any project of crime prevention, rehabilitat[ing] of persons previously convicted of crime" and to "prevent[ing] and suppress[ing] any affrays, breaches of the peace, riots and insurrections." Cal. Govt. Code §§ 26600, 26602. These are indubitably law enforcement functions and should not lose their status as such because those functions happen to occur within the walls of a jail facility – a facility that the State requires the Sheriff to operate. See Govt. Code § 26605; Penal Code § 4000. In establishing policies regarding strip searches of criminal inmates upon returning to the jail from court, the Sheriff of Kern County is preserving the peace and preventing affrays that arise when contraband is smuggled into the Kern County jail – all of which are clearly law enforcement functions. See Govt. Code §§ 26601, 26602. In addition, persons detained at the jail have been arrested for committing crimes violating state law and are awaiting trial, have already been convicted of and sentenced for violating state law and/or are detained as witnesses or under orders of civil process or contempt. In essence, the Sheriff promulgates and maintains policies to ensure that violators of California law are held to answer the charges filed against them by the district attorney, who acts on behalf of the State, in the Superior Court, which is a division of the State. Because the functions of the Sheriff in this case can only be classified as benefitting and occurring on behalf of the State of California, the Sheriff cannot be classified as being a policymaker for Kern County. Accordingly, he is immune from § 1983 liability pursuant to the Eleventh Amendment as to any policy he makes regarding strip searches.

B. The Rulings of the Ninth Circuit Court of Appeals Analyzing McMillian as to California Sheriffs Fail to Follow McMillian's Requirement of Deference to the Rulings of the California Supreme Court Regarding Determination as to Whether a Defendant Acts on Behalf of the State or the County for Purposes of Eleventh Amendment Immunity

Decisions of the Court of Appeals for the Ninth Circuit do not preclude finding that the

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Sheriff acted for the State of California in establishing the strip search policy for the jail. In Streit v. County of Los Angeles, 236 F.3d 552 (9th Cir. 2001), the Court held that the Los Angeles Sheriff's Department was subject to § 1983 liability because the sheriff acted for the County as the jail administrator when he set policy for conducting prisoner release record checks. The policy at issue in Streit is distinguishable from the conduct at issue in the instant case. There, the Court found that the sheriff acted for the county when he established a policy whereby prisoners were not released until after all recent warrants and holds were checked – a purely administrative function. In contrast, the instant case concerns the coordination of efforts to maintain the peace and safety of citizens who happen to be detained in the jail, as the Sheriff is mandated to do by California law and under the direction of the California Attorney General. Notably, Streit observed that courts analyzing application of Eleventh Amendment immunity are to avoid a "categorical all or nothing approach." Id. An inquiry must be made on a case-by-case basis to determine whether governmental officials are final policymakers for the local government in a particular area or on a particular issue. Id.

Here, to the extent that the Defendant Sheriffs established any type of policy regarding the strip searches, it was a policy established on behalf of the State of California to maintain prisoners' safety while charges were pending against them or to incarcerate them on behalf of the State after they were convicted. The anticipated criminal prosecutions for which the detainees are held in the jail do not benefit Kern County, but instead benefit the People of the State of California. The Eastern District of California has already granted Eleventh Amendment immunity to Sheriffs in a custodial setting. See McNeely v. County of Sacramento, 2008 U.S.Dist.LEXIS 12460 (E.D. Cal. 2008).[6] In granting summary judgment to Defendants, the district court held: "Here, there can be

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[6]In McNeely, the plaintiff was convicted in Placer County for a felony violation and sentenced to five years probation. Less than three years later, in Sacramento County, he was again charged with the same crime as well as for failing failure to register as a sex offender in Sacramento County. He was taken into custody in Sacramento County. Thereafter, the Placer County Probation Department filed a Petition to revoke probation based on the allegations in the Sacramento case. The Placer County Superior Court summarily revoked the plaintiff's probation and issued a bench warrant for his arrest. A detainer warrant was issued, noting that the plaintiff was wanted by Placer County and that "if the subject is to be released by [Sacramento County], please notify [Placer County] for pick up." That request was reiterated on a subsequent date when the Placer County Corrections Department again requested that Sacramento County contact them before releasing the plaintiff. Id. at 2-3. Plaintiff was arraigned on a probation revocation petition. After the Sacramento County proceedings were repeatedly continued for various reasons, plaintiff filed a writ of habeas corpus on grounds

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no question that [the] Sheriff ... [was] acting in accordance with both facially valid warrants as well as duly authorized criminal proceedings instituted by the District Attorneys of their respective counties and pending before their courts." Id. at 12 In other words, there, as here, the Sheriff was acting on behalf of the district attorney, whom the Ninth Circuit has unequivocally designated as being a representative of the state, as well as the court, which also is an arm of the state. [7] As the court further noted in McNeely: "Under California Penal Code § 4004, a sheriff is obligated to keep a detainee in county jail 'until legally discharged.'" Id. at 13. Moreover, the Northern District of California also has recognized that the sheriff is a state actor, and hence not subject to suit, in an action arising from a detainee's arrest and incarceration based upon an outstanding warrant. Smith v. County of San Mateo, 1999 U.S. Dist. LEXIS 13253 (N.D. Cal. 1999). In sum, the Sheriff is responsible *by California statute* to hold and maintain the detainees safety until a *court of the State of California* forwards the appropriate order for their release. Thus, there can be no dispute that in this limited scope the Sheriff is acting for and on behalf of the State of California and therefore he is entitled to Eleventh Amendment immunity for his actions as to this particularly group of prisoners.

The decisions in Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001) and Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893 (9th Cir. 2002), *vacated*, do not preclude finding that Sheriff Youngblood is a state actor. In Brewster, the Ninth Court held that the Shasta County Sheriff acted as a final policymaker for the county specifically when he was alleged to have manipulated a witness, failed to test physical evidence and failed to disclose exculpatory evidence. Brewster, 275 F.3d at

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that right to speedy trial under the Sixth Amendment to the United States Constitution had been violated. The Ninth Circuit granted the petition and ordered that the Sacramento County criminal charges be dismissed with prejudice and that the plaintiff be released on Friday, July 25, 2003. On the next business day, Monday, July 28, 2003, Sacramento County jail personnel notified Placer County pursuant to the latter's detainer warrant that plaintiff was available for pick up. Placer County was not a party to the proceedings which had resulted in Plaintiff's release from custody in Sacramento County. Placer County retrieved Plaintiff some days later and incarcerated him there. Plaintiff challenged the detention and asserted that Sacramento County and Sacramento County Sheriff Lou Blanas had violated his rights under the Fourth Amendment when he was held on the detainer warrant at the request of Placer County. Id. at 3-6.

[7] In addition, persons who faithfully execute valid court orders and their public entity employers are absolutely immune from liability for damages in civil rights actions challenging conduct authorized by the order. Coverdell v. Dep't of Social & Health Servs., 834 F.2d 758, 764-65 (9th Cir. 1987). This is particularly true here, where the Sheriff is beholden to the superior court to engage in any conduct at all and, in fact, holds the prisoners at the behest of the court until the necessary release paperwork is received.

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812. In Bishop, the court held that the sheriff and the district attorney were county actors when they obtained and executed a search warrant that was alleged to be in excess of their jurisdiction. Bishop Paiute Tribe, 275 F.3d 909-910. First, the conduct at issue in Brewster and Bishop is entirely distinguishable from the conduct at issue in this case as in the instant case, as Defendant Youngblood is not being sued for conduct he engaged in while fulfilling investigatory duties. Instead, he is being sued solely for his activities in promulgating policy affecting prisoners charged with violation of California law as he is required to do by California statute.

Of significant importance, the Ninth Circuit decided Streit, Brewster and Bishop well before the California Supreme Court considered precisely this same issue in Venegas v. County of Los Angeles, supra. As noted above, in deciding a McMillian issue, a reviewing court is required to look to state constitutions, statute *and* relevant case law. The Venegas Court engaged in a pure McMillian analysis regarding Sheriffs in California acting as State officials in regard to enforcing the Penal Code, concluding that they are shielded by Eleventh Amendment immunity in § 1983 actions. See Id. at 828-30. In so concluding, the Venegas Court analyzed various portions of the California Constitution and Government Code statutes and reviewed and relied upon its own prior ruling in Pitts v. County of Kern, in which the Court held that those very same statutes provided Eleventh Amendment immunity to District Attorneys of the various counties in California, thus warranting extension of the immunity to Sheriffs. Id. The Ninth Circuit has repeatedly relied on Pitts in holding that District Attorneys in California are immune from § 1983 liability. See, e.g., Ceballos v. Garcetti, 361 F.3d 1168, 1182-83 (9th Cir. 2004) (relying on Pitts and holding that "a district attorney is a state official when he acts as a public prosecutor. . . In the prosecution of criminal cases he acts by the authority and in the name of the people of the state."); Sonnier v. Los Angeles County District Attorney's Office, 33 Fed. Appx. 252, 254 (9th Cir. 2002) (relying on Pitts and holding that "the Los Angeles County District Attorney is an agent of the state, not the county, and therefore is not a proper defendant in a § 1983 action"). Those same statutes that led the California Supreme Court to find Eleventh Amendment immunity applicable to District Attorneys are the same statutes that led that same Court to apply the immunity to Sheriffs in California – the same cases now utilized by the Ninth Circuit.

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There is plainly an inconsistency and split of authority between the laws and judicial precedent of the State of California and the rulings of the Ninth Circuit Court of Appeals regarding application of Eleventh Amendment immunity to California Sheriffs, particularly since the Ninth Circuit has held that, in fact, the County acts as "an 'arm of the state.'" Franceschi v. Schwartz, 57 F.3d 828, 831 (9th Cir. 1995). In Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003), the Ninth Circuit focused on the issue of "when, if ever, a district court or a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue."[8] Id. at 899. The Miller panel concluded that "the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." Id. at 900. There is no question that the California Supreme Court is the court of last resort for the interpretation of California law. See Weiner v. County of San Diego, 210 F.3d 1025, 1030 (9th Cir. 2000)("In addition to California's constitutional and statutory law, we also consider its case law, giving due respect to decisions by the California Supreme Court as the *ultimate interpreter* of California State law") (emphasis added). Here, the Ninth Circuit's prior rulings in Streit, Brewster and Bishop are directly and irreconcilably at odds with the California Supreme Court's ruling in Venegas that California Sheriffs are state officers while performing law enforcement duties, though even Streit acknowledges that the determination of Eleventh Amendment immunity must focus on the particular action alleged to have deprived the plaintiff of his civil rights. See Streit, 236 F.3d at 564. This Court should accord deference to the interpretation and application of California law established by the California Supreme Court – the relevant court of last resort in the interpretation of California law – particularly in light of McMillian's mandate that a reviewing court should defer to any interpretive case law from the state in question. McMillian, at 789; see Jacintoport Corp. v. Greater Baton Rouge Port Comm'n, 762 F.2d 435, 438 (5th Cir. 1985) ("in determining immunity under the Eleventh

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[8]In Miller, the Ninth Circuit reversed an absolute immunity rule for social workers that was established in Babcock v. Tyler, 884 F.2d 497 (9th Cir. 1989), in light of a more functional approach to immunity taken by the United States Supreme Court in two subsequent decisions, Antoine v. Byers & Anderson, Inc., 408 U.S. 429 (1991), and Kalina v. Fletcher, 522 U.S. 118 (1997). The Miller court affirmed the district court's deferred ruling on a motion to dismiss and its refusal to apply Babcock until the nature of the functions that the defendant in that case performed were outlined to apply Antoine and Kalina.

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Amendment, a factor that 'subsumes all others' is the treatment of the entity in state courts"). It is only common sense to conclude that if the Ninth Circuit recognizes the authority of the California Supreme Court as being the "ultimate interpreter" of state law in regard to District Attorneys under Pitts, then it must afford the same deference to the decision of the California Supreme Court in Venegas that applies Eleventh Amendment immunity to Sheriffs in regard to their law enforcement duties.

Defendants respectfully submit that because the Defendant Sheriffs is a state actor in this scope, they cannot be sued under § 1983 pursuant to the Eleventh Amendment. Accordingly, Defendants respectfully request that their motion for summary adjudication be granted in this regard.

VII.

THE COUNTY OF KERN IS AN IMPROPER PARTY TO THIS ACTION

As stated above, pursuant to § 1983, local government entities may only be held liable for constitutional injuries that are inflicted by their officials which are pursuant to municipal policy, practice or custome. Monell, *supra*, 436 U.S. at 654. As discussed in greater detail above, the Supreme Court in McMillian reaffirmed that state government actors cannot be liable under § 1983. Further, in accordance with Pitts, County of los Angeles v. Superior Court (Peters), 68 Cal.App.4th (1998), and Venegas, the counties also sued in each case also were dismissed from each respective matter because the actions taken by the District Attorney or the Sheriff occurred on behalf of the State rather than the County, resulting in the individual Defendants not being subject to suit under § 1983 pursuant to the Eleventh Amendment. Because the conduct at issue in each of these cases occurred on behalf of the State in relation to dealing with crime, these courts concluded that no County involvement existed in the claim which the plaintiffs therein asserted.

On this basis, the Kern County Sheriff in his official capacity, in addressing and fighting crime within the confines of the jail, acts on behalf of the State of California. Therefore, in that capacity he did not act on behalf of the County of Kern. Thus, because he was acting for the State and not the County of Kern, no liability can be imputed to the County of Kern under Monell for any actions related to the strip search of detainees returning to the jail from the Kern County Superior Court for appearances related to the criminal charges against them. Accordingly, the County of Kern

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is an improper party to this action and Defendants respectfully request that their motion for summary adjudication as to any claims asserted against the County be granted.

VIII.

CONCLUSION

Based on all of the foregoing, Defendants SHERIFF DONNY YOUNGBLOOD, FORMER SHERIFF MACK WIMBISH, COUNTY OF KERN and its agency the KERN COUNTY SHERIFF'S OFFICE jointly request that their Motion for Summary Adjudication be granted.

Respectfully submitted,

Dated: November 7, 2008

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A PROFESSIONAL CORPORATION

By /s/ Terence J. Cassidy
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Dated: November 5, 2008

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