UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREGORY GARVEY, Sr. on behalf of himself and on behalf of others similarly situated, Plaintiffs v. FREDERICK B. MACDONALD and FORBES BYRON in their individual capacities, Defendants	Civil Action No. 07-30049-KPN

MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION

Plaintiff, Gregory Garvey, seeks to represent a class of approximately 400 people who were illegally strip searched at the Franklin County Jail and House of Correction ("Jail"). The proposed class consists of all people strip searched without individualized reasonable suspicion on or after March 28, 2004, and before February 25, 2007, at the Franklin County Jail

(a) while waiting for bail to be set or for a first court appearance after being arrested on charges that did not involve a weapon, drugs, contraband or a violent felony, or

(b) while waiting for a first court appearance after being arrested on a default or other warrant for charges that did not involve a weapon, drugs, contraband or a violent felony.

The illegal searches were conducted pursuant to a policy or practice of Sheriff Frederick Macdonald's that was implemented by Special Sheriff Forbes Byron, the jail superintendent. Plaintiff moves the Court to certify this case as a class action under Fed. R. Civ. P. 23(b)(3).

I. INTRODUCTION

Plaintiff seeks to represent a class of approximately 400 class members who were injured

by the unconstitutional strip searches at the Jail pursuant to a formal written policy established by Sheriff Macdonald, which was implemented by Special Sheriff Byron. On February 25, 2007, the Defendants ended the challenged policy.

Courts in numerous jurisdictions around the country have certified similar class actions because they serve the interests of justice and easily satisfy the requirements of Rule 23.[1] In the District of Massachusetts, three very similar class actions have been certified for pre-arraignment detainees who were strip searched at a jail based on a blanket strip search policy like the one at issue in this case: *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); *Connor v. Plymouth County*, Civil Action No. 00-10835-RBC (D. Mass.); and *Ryan v. Garvey*, Civil Action No. 05-30017-MAP (D. Mass.). The First Circuit approved class certification in two similar cases in Maine. *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004). If this Court certifies this action, it will preside over a manageable case that – like many such cases before it – will provide a uniform and efficient resolution of the claims arising from Defendants' strip search practices.

II. FACTS

A. The Named Plaintiff Was Strip Searched Pursuant to the Jail's Policy

The named Plaintiff was subjected to Defendants' uniform strip search policy.[2] On Tuesday, January 30, 2007, at approximately 11:00 p.m., Sunderland police officers arrived at Mr. Garvey's home and placed him under arrest for failure to appear in court earlier that day for a motor vehicle case. Mr. Garvey had not received notice of the court date. After the arrest, the

[1] *See, e.g., Johnson v. District of Columbia,* -- F. Supp. 2d --, 2008 WL 344739, at *2 (D.D.C. 2008) ("Courts routinely certify strip search class actions.") (collecting cases)

[2] Except as noted, the facts in this section are taken from the Complaint.

police officers took Mr. Garvey to the Sunderland Police Station, where he was fingerprinted and processed. Then Sunderland police officers took him to the Franklin County Jail in Greenfield, Massachusetts, to be held until he could appear in court the next morning. It was the practice of police officers in Sunderland and other police departments in Franklin County to bring pre-arraignment detainees to the Franklin County Jail to be held before their first court appearance. This practice was mandated by General Order 506, which Sheriff Macdonald issued and Special Sheriff Byron implemented, and which was in effect throughout the proposed class period. Until February 25, 2007, when it was modified, the order mandated that all detainees except those in protective custody were to be strip searched on admission to the Jail and again before leaving the Jail to go to court.[3]

During the admission procedure at the Franklin County Jail, a correctional officer ordered Mr. Garvey to remove all of his clothing, and he had to submit to a strip search. The next morning, Mr. Garvey was strip searched again before he was allowed to put on his clothing to go to court. There was no reason at any time to suspect that Mr. Garvey had contraband on his body. No contraband was found during either strip search. When Mr. Garvey appeared in court, all of the charges were dropped against Mr. Garvey, and he was informed that he was free to leave.

B. Defendants Had a Policy of Strip Searching Arrestees without Individualized Reasonable Suspicion

General Order 506 of the Office of the Franklin County Sheriff required Franklin County Jail officers to conduct a strip search, without evaluating for individualized reasonable suspicion, of every person both at the time of admission to the Franklin County Jail and before leaving for a

[3] *See* Affidavit of Howard Friedman ("Friedman Aff.") ¶ 10 & Exhibit A, § .05.

first court appearance, with the sole exception of those people who were held pursuant to the protective custody statute. The policy applied regardless of the person's charges or anticipated duration of detention. The policy directed employees of the Sheriff's Department to conduct illegal strip searches of the Plaintiff and of every member of the Plaintiff class. From March 28, 2004, until February 25, 2007, approximately 400 individuals were strip-searched pursuant to this policy.[4]

Defendants Macdonald and Byron knew, or should have known, that the policy or practice of conducting strip searches at intake of pre-arraignment prisoners, without individualized reasonable suspicion, violated the United States Constitution. On July 31, 2001, a Massachusetts district court issued a decision granting summary judgment to plaintiffs for a similar policy implemented by the Sheriff of Suffolk County, holding that the law was clearly established in 1997 that routine intake strip searches of pre-arraignment detainees without evaluating for cause were unconstitutional.[5] Although Defendants Macdonald and Bryon had an obligation to correct their policy so that it would conform to the Constitution, they allowed it to continue until February 25, 2007.

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[4] Affidavit of David Milton ("Milton Aff.") ¶¶ 6-8.

[5] *Ford v. City of Boston*, 154 F.Supp.2d 131, 147 (D.Mass. 2001) (citing *Swain v. Spinney,* 117 F.3d 1 (1st Cir. 1997)). The First Circuit defines a "strip search" as a visual inspection of an inmate's naked body and a "visual body cavity search" as a strip search that includes the visual inspection of an inmate's anal and genital areas. *Blackburn v. Snow*, 771 F.2d 556, 561 n. 3 (1st Cir. 1985). Reasonable suspicion is required before a detainee may be subjected to either a strip search or a visual body cavity search. *Swain v. Spinney*, 117 F.3d 1,7 (1st Cir. 1997). Blanket strip search policies implemented regardless of reasonable suspicion violate the Fourth Amendment. *Roberts v. State of Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001). Searches conducted pursuant to Defendants' policy fall within *Blackburn*'s definition, lack the reasonable suspicion required by *Swain,* and violate *Roberts*. The Jail's policy was illegal.

III. ARGUMENT

A. STANDARD OF REVIEW

The named Plaintiff moves this Court to certify this action as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(3). Rule 23 provides that any action may be maintained as a class action when it meets the four prerequisite of subsection (a) and fits within any of the classifications set out in subsection (b).

Class certification, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court.[6] The requirements of the rule are to be given "a liberal rather than a restrictive construction, and courts are to adopt a standard of flexibility."[7] In close cases, courts should err in favor of certification.[8] "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."[9]

B. THIS CLASS SATISFIES THE REQUIREMENTS OF RULE 23(a)

The proposed class easily satisfies the four criteria of Rule 23(a). Each of these requirements – numerosity, commonality, typicality, and adequacy of representation – is discussed

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[6] *Califano v. Yamasaki,* 442 U.S. 682, 703 (1979); *see also Lamphere v. Brown Univ.*, 553 F.2d 714, 719 (1st Cir. 1977); *John Hancock Life Ins. Co. v. Goldman, Sachs & Co.,* 2004 WL 438790, at *2 (D. Mass. Mar. 9, 2004)

[7] *In re Eaton Vance Corp. Sec. Litig.,* 220 F.R.D. 162, 170 (D. Mass. 2004) (citation and quotation marks omittted).

[8] *Eisenberg v. Gagnon,* 766 F.2d 770, 785 (3d Cir. 1985); *Payne v. Goodyear Tire, Inc.,* 216 F.R.D. 21, 25 (D. Mass. 2004).

[9] *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 298 (1st Cir. 2000) (quoting *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178 (1974)); *see also In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 6 (1st Cir. 2005)(district court may not inquire whether plaintiffs will prevail on the merits but may "look beyond the pleadings" to determine whether requirements for class certification are met).

in turn below.

1. The Class Is So Numerous That Joinder of All Members Is Impracticable

The proposed class includes approximately 400 class members who have had their rights violated by Defendants' strip search policy. Joinder of all these people as individual plaintiffs would be impractical. As a leading treatise on class actions notes, "the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable."[10] This is especially true in this case, which alleges a violation of privacy and which arises out of class members' arrests, since many class members whose constitutional rights were violated might be reluctant to be publicly identified as a plaintiff. The numerosity prerequisite has been satisfied.

2. There Are Questions of Law or Fact Common to the Class

Plaintiffs easily clear the "low hurdle" for showing commonality under Rule 23(a), "which requires only a basic demonstration that there are common questions of law or fact in the case."[11] This requirement is met by even a single issue of law or fact common to the putative class.[12] Where, as here, the "claims of the proposed class stem from the same alleged unconstitutional conduct of the defendants,"[13] commonality is satisfied notwithstanding whatever individualized

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[10] 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* (*"Newberg*") §3:5 (4th ed. 1992); *see also, e.g., In re Relafen Antitrust Litig.,* 218 F.R.D. 337, 342 (D. Mass. 2003) ("forty individuals generally found to establish numerosity"); *Fraser v. Major League Soccer, L.L.C.*, 180 F.R.D. 178, 180 (D. Mass. 1998) (joinder of approximately 200 individual class members impracticable).

[11] *Southern States Police Benevolent Assoc., Inc. v. First Choice Armor & Equip., Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007).

[12] *Yaffee v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (denial of class certification appropriate only if "there are *no* questions of law *or* of fact common to the class) (emphasis added); *see also, e.g., Southern States,* 241 F.R.D. at 87; *Swack v. Credit Suisse First Boston,* 230 F.R.D. 250, 259 (D. Mass. 2005).

[13] *Daniels v. City of New York,* 198 F.R.D. 409, 417 (S.D.N.Y. 2001); *see also, e.g., Mack v. Suffolk County,* 191 F.R.D. 16, 23 (D. Mass. 2000).

variations may exist among the claims of class members.[14]

In this case, the most salient common issue raised by Plaintiff and all class members is that the searches to which they were subjected violated the Constitution because they were not based on reasonable suspicion, but were instead conducted pursuant to a blanket strip search policy. In certifying strip search class actions, courts have routinely found commonality satisfied where, as in this case, the searches were conducted (or alleged to be conducted) pursuant to a uniform strip search policy or custom.[15]

3. The Claims of the Representative Party Are Typical of Those of the Class

A class representative's claims are "typical" when "named plaintiffs' claims arise from the same course of conduct that gave rise to the claims of the absent [class] members."[16] The named Plaintiff's claims here arise from the same policy as the claims of the unnamed Plaintiffs. Pursuant to Defendants' uniform policy, Plaintiff and all class members were subjected to strip searches

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[14] *See Mack,*191 F.R.D. at 23; *Risinger ex rel. Risinger v. Concannon,* 201 F.R.D. 16, 19 (D. Me. 2001) ("[V]arying fact patterns may underlie individual claims as long as a common pattern of unlawful conduct by the defendant is directed at class members.") (citations and quotation marks omitted); *see also Newberg* § 3.10 ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persons affected.").

[15] *See, e.g., Mack,* 191 F.R.D. at 23 ("[Class representatives and class members] share a common legal theory, that these searches were unconstitutional because, conducted pursuant to a blanket strip-search policy, they were not based on a reasonable suspicion that the individuals searched were concealing weapons or contraband."); *Engeseth v. County of Isanti, Minn.,* 2007 WL 3102074, at *7 (D. Minn. Oct. 23, 2007); *Bildhove v. St. Croix County, Wis.,* 219 F.R.D. 607, 617 (W.D. Wis. 2003).

[16] *In re Relafen Sec. Litig.*, 218 F.R.D. at 343 (citations and quotation marks omitted; alteration in original); *see also Curtis v. Comm'r Maine Dep't of Human Servs.*, 159 F.R.D. at 341 (typicality met where named plaintiff "subject to the same statute and policy as the class members"); *see also Newberg* § 3:13 ("[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.").

without individualized reasonable suspicion. There was nothing atypical about the circumstances of Mr. Garvey's search, and there is nothing atypical about Mr. Garvey's legal claims. In any event, it is well established that any factual differences that exist among the claims "will not preclude class certification when the claims arise from the same course of conduct and give rise to the same legal or remedial theories."[17]

4. The Representative Party Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that the named plaintiffs will "fairly and adequately protect the interests of the class." Specifically, the named plaintiff must show that "there exists no conflict between the interests of the Named Plaintiffs and the class members."[18] Only a "fundamental" conflict will defeat adequacy under the rule.[19]

Here, there is little if any potential for conflict, given that the claims of the named Plaintiff and those of absent class members "state common injuries and legal theories."[20] Because all class members were strip searched pursuant to the same policy as the named Plaintiff, all will benefit from a showing that such policy was unconstitutional.[21]

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[17] *Engeseth*, 2007 WL 3102074, at *7; *see also, e.g, Baby Neal for and by Kantor v. Casey,* 43 F.3d 48, 58 (3d Cir. 1994) ("[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.") (citing *Newberg* § 3:13); *Payne,* 216 F.R.D. at 26 (quoting 5 *Moore's Federal Practice* § 23.24[4]).

[18] *Southern States,* 241 F.R.D. at 88.

[19] *In re Visa Check/Master Money Antitrust Litig.,* 280 F.3d 124, 145 (2d Cir. 2001) (citing *Newberg* §3.26).

[20] *Mack,* 191 F.R.D. at 23.

[21] *See Hirschfeld v. Stone,* 193 F.R.D. 175, 183 (S.D.N.Y. 2000) ("The interests of the named plaintiffs appear to be identical to those of the class because all are subject to the same allegedly unconstitutional actions by defendants. If the named plaintiffs prevail, all class members will benefit.").

5. Attorneys for the Named Plaintiff Will Fairly and Adequately Protect the Interests of the Class

When certifying a class, the court must appoint class counsel who will fairly and adequately represent the class's interests.[22] In making such an appointment, the court must consider counsel's work in identifying or investigating potential claims; counsel's experience in handling class actions, complex litigation, and claims similar to those asserted in the action; counsel's knowledge of the applicable law; the resources counsel will commit to representing the class; and any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.[23]

Plaintiffs' counsel, the Law Offices of Howard Friedman, P.C., easily meet this standard. As the attached affidavits show, the firm's attorneys bring a wealth of relevant experience to this litigation and are well-acquainted with complex federal litigation. Attorney Friedman has extensive experience in §1983 litigation in state and federal courts and has successfully represented plaintiffs in other class action suits, including four that, like this case, alleged an unconstitutional policy or custom of strip searching pre-arraignment detainees.[24] Attorney David Milton, an associate at the firm, also has significant experience bringing civil rights cases under §1983 on both an individual and class-wide basis.[25] The firm has identified and investigated the

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[22] Fed. R. Civ. P. 23(g)(1)(A)-(B).

[23] Fed. R. Civ. P. 23(g)(1)(C)(i)-(ii).

[24] Friedman Aff. ¶¶ 3-4.

[25] Milton Aff. ¶¶ 4-5.

claim and is willing to commit the resources necessary to take this case to trial.[26] No other applicant seeks appointment as class counsel.[27]

C. THIS CLASS ACTION IS PROPERLY MAINTAINABLE UNDER RULE 23(b)(3) OF THE FEDERAL RULES OF CIVIL PROCEDURE

"Certification pursuant to Rule 23(b)(3) is 'intended to be a less stringent requirement' than certification pursuant to either Rule 23(b)(1) or (b)(2)."[28] A Rule 23(b)(3) class is appropriate where the court finds that common questions of law or fact predominate over individual ones and that a class action is superior to other methods of adjudicating the controversy.[29] Both of these prongs are met in this case.

1. Common Legal and Factual Questions Predominate

A finding of predominance is warranted where "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication."[30] Predominance does not require uniformity among the claims of class members, but merely "a sufficient constellation of common issues [that] binds class members together."[31] In light of this standard, courts have routinely certified (b)(3) classes in civil rights cases on behalf of detainees

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[26] Friedman Aff. ¶ 12.

[27] Friedman Aff. ¶ 13.

[28] *Southern States,* 241 F.R.D. at 88-89 (citing *Smilow v. Southwestern Bell Mobile Sys., Inc.,* 323 F.3d 32, 41 (1st Cir. 2003)).

[29] Fed. R. Civ. P. 23(b)(3); *see Tardiff,* 365 F.3d at 4.

[30] *Thomas v. Baca,* 231 F.R.D. 397, 402 (C. D. Cal. 2005) (citing Wright, Miller & Kane, 7AA *Federal Practice & Procedure* § 1778).

[31] *Southern States,* 241 F.R.D. at 89 (citing *Mowbray,* 208 F.3d at 296); *accord, Smilow,* 323 F.3d at 39 ("After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.").

and prisoners asserting a common legal grievance based on the same strip search policy or practice.[32]

Defendants may note that damages could vary from individual to individual, but the First Circuit has rejected this argument. In affirming class certification decisions in two cases alleging unlawful strip searches of detainees in Maine, the Court held that where common questions regarding liability predominate, the existence of individualized damages issues does not defeat class certification.[33] Further, as the First Circuit has explained, district courts have a number of procedural devices for dealing with individualized damages issues that may arise.[34]

In *Mack*, the plaintiffs were, as here, all arrestees subjected to strip searches without individualized reasonable suspicion. The court held that "given the uniform and indiscriminate nature of the strip search policy . . . liability can be determined on a class-wide, rather than individual basis."[35] After the case was certified, summary judgment established the defendants'

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[32] *See, e.g., Tardiff,* 365 F.3d at 6 (affirming certification of two class actions where class members were all subject to the same strip search policy); *In re Nassau County Strip Search Cases,* 461 F.3d 219, 230-31 (2d Cir. 2006) (reversing denial of certification of class action arising out of blanket strip search policy); *Mack,* 191 F.R.D. at 24 (certifying class of women detainees subjected to same strip search policy); *Johnson,* 2008 WL 344739, at *2 (certifying class of arrestees subject to blanket strip search policy); *see also Dodge v. County of Orange,* 226 F.R.D. 177, 182 (S.D.N.Y. 2005) ("In similar circumstances involving facility-wide strip search policies, courts have not hesitated to certify classes.")(collecting cases).

[33] *Tardiff,* 365 F.3d at 6; *see also Smilow,* 323 F.3d at 40 (collecting cases and other authorities); *Mack*, 191 F.R.D. at 25 (despite the possibility of individualized damages, class certification was appropriate because the plaintiffs, who were subjected to the same strip search policy, shared sufficient common legal claims)

[34] *See Tardiff,* 365 F.3d at 6; *Smilow,* 323 F.3d at 40; *see also In re Visa Check/Master Money Antitrust Litig.,* 280 F.3d at 141 (district court may, *inter alia*, bifurcate liability and damages trials, appoint magistrate judge or special master to oversee damages determinations, create subclasses or alter class definition, or enter judgment on liability only), *cited in Smilow,* 323 F.3d at 40.

[35] *Mack,* 191 F.R.D. at 25.

liability to all class members; the issue of damages was resolved by settlement.[36]

As in *Mack*, all proposed class members here have been subjected to an unconstitutional strip search. The injuries to all class members arise out of a single course of conduct. All class members share a single legal theory arising under similar factual circumstances. Because common factual and legal issues far outweigh the individual issues in this case, this court should grant certification under Rule 23(b)(3).

2. Class Action Is Superior to Other Methods of Adjudication

Rule 23(b)(3) also requires that the court determine that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." The rule lists four nonexclusive factors for courts to consider, each of which, as discussed below, supports certification.

The first factor – the interest of members of the class in individually controlling the prosecution of separate actions – weighs in favor of class certification. This case presents a classic example of one where few class members are likely to bring individual lawsuits in light of the relatively small amount of damages that one would likely recover.[37] If class certification is denied, then the constitutional harm suffered by hundreds of individuals will go unredressed.

The second and third factors also support certification. Plaintiffs' counsel is unaware of

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[36] The undersigned represented the plaintiff and plaintiff class in *Mack*.

[37] *See Tardiff,* 365 F.3d at 7 (finding superiority because "[t] vast majority of claims would never be brought because provable actual damages are too small"); *Smilow,* 323 F.3d at 41 (noting that "policy goals underlying Rule 23(b)(3)" support certification as a means of vindicating rights of "groups of people whose individual claims would be too small to warrant litigation"); *see also In Nassau County Strip Search Cases*, 461 F.3d 230 ("[W]ithout class notification, most putative class members will not even know that they suffered a violation of their constitutional rights.").

any litigation already commenced (or even contemplated) by members of the class, and this forum, where class members were all housed and where the majority of the class members presumably reside, is the most appropriate.

Finally, no great difficulties will arise in managing this case as a class action. The identity of every class member is known to the Defendants, who also possess a last-known address for all class members. Class membership can be determined from Defendants' computerized booking records.[38]

V. CONCLUSION

Plaintiffs have met all of the requirements of Federal Rule of Civil Procedure 23 for certification of the class. Plaintiffs therefore respectfully request that this Court certify the Plaintiff class as described in their motion for Class Certification.

RESPECTFULLY SUBMITTED,

/s/ Howard Friedman

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[38] In any event, "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *Newberg* §4.25. As discussed above, the court has a number of procedural options, such as limiting certification to liability or establishing sub-classes, should issues of manageability later arise.

CERTIFICATE OF SERVICE

I certify that on this day I caused a true copy of the above document to be served upon the attorney of record for all parties via ECF.

Date: 3/14/08 */s/ Howard Friedman*
Howard Friedman