

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

GRETA CAZENAIVE, ET AL

Plaintiffs

VERSUS

SHERIFF CHARLES C. FOTI, JR. ET AL

Defendants

CIVIL ACTION

NUMBER 00-1246

SECTION A

JUDGE JAY C. ZAINEY

MAGISTRATE SECTION 5

MAGISTRATE ALMA L. CHASEZ

**PROPOSED ORDER OF PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AGREEMENT**

This Court having duly considered the Joint Motion for Preliminary Approval of Class Action Settlement Agreement and Memorandum in Support thereof, together with the Class Action Settlement Agreement and supporting materials; and the Court being informed that the Plaintiffs, Jeff Brite, William Brice White III, Lionel Nelson, George Wurz, Anthony Pogorzelski, Kendra Spencer, Tony Buchen, and Sylvia Brown, appearing herein as Class Representatives and the Defendants, Charles C. Foti, Jr., in his individual capacity, Wardens Barbara Acomb, William Short, Joseph Howard, John LaCour, Gary Bordelon, and Chief Rudy Belisle, each in their individual and

official capacities, and Marlin N. Gusman, in his official capacity only as the present Criminal Sheriff of Orleans Parish,¹ appearing by and through their undersigned counsel, have entered into a Class Action Settlement Agreement (“Settlement Agreement”) intended to resolve the litigation in the above numbered and entitled proceeding with a proposed settlement and dismissal. All of the searches complained of occurred during the administration of former Criminal Sheriff Charles C. Foti, Jr. Sheriff Gusman enters into the Settlement Agreement only in his official capacity as the present Criminal Sheriff, in order to carry into effect the obligations of settlement of this case which are the legal obligations of the OPCSO because they were agreed to by his predecessors in office and became binding on the Sheriff’s Office prior to Sheriff Gusman’s election as Sheriff.

After due consideration of applicable law and the proceedings in this case;

IT IS HEREBY ORDERED that this Motion is GRANTED and that the Class Action Settlement Agreement is hereby APPROVED by the Court, and ADOPTED herein in all its terms and conditions, subject to the following:

1. The Settlement Agreement is hereby preliminarily approved, subject to further consideration thereof at the fairness hearing provided for herein. The Court finds that said Settlement Agreement is sufficiently within the range of reasonableness and that notice of this proposed class action settlement should be given as provided in this Order and as set forth in detail in the Settlement Agreement.

¹Sheriff Marlin N. Gusman appears herein in his official capacity only for the purposes set forth below (he is sometimes hereinafter referred to collectively with the named defendants as “Defendants” only to include his office (the Orleans Parish Criminal Sheriff’s Office, “OPCSO”) as an entity obligated under the terms of the Settlement Agreement.

2. Pursuant to Fed. R. Civ. P. Rule 23, the Court reaffirms the previous certification of the Class/Sub-Classes under Fed. R. Civ. P. 23(b)(2) for injunctive relief and reaffirms all previous orders issued by the Court relative to the injunctive and other relief sought and obtained in these proceedings.

3. The Court preliminarily finds that the 23(b)(2) injunctive class achieved institutional reform in the form of injunctive relief, to stop the policies, practices, and searches at issue herein which were previously in effect at OPCSO, to prevent the OPCSO from reinstating said policies, practices, and searches, and to deter the OPCSO and others from pursuing such policies, practices, and searches; and that the monetary relief provided for by the Settlement Agreement under 23(b)(3) is fair and reasonable under the circumstances of this case. This settlement is supported by other strip search class action damage settlement classes certified in federal court circuits around the country. (See, Doc. No. 129, filed February 23, 2005 – Research return to Court on issues relating to other class actions settlements nationwide; see also, Joint Memorandum in Support of Class Action Settlement and cases cited therein).

4. The Court finds that, as a matter of law, punitive damages are not available against a public entity such as the OPCSO and are potentially available in this lawsuit only against the individual defendants sued in their individual capacity pursuant to 42 USC §1983. The Court further preliminarily finds that the ability of the individual defendants to pay damages in this litigation as awarded in a judgment is highly unlikely to be within their means in comparison to the number of potential claims by class members.

5. The Court finds that the OPCSO is a public entity, dependent upon funds generated mostly from the public, directly or indirectly, through taxes, bonds and fees; that the needs

of the OPCSO for these funds are great; that the financial resources available to the OPCSO to pay the claims of the Class/Sub-Classes are greatly restricted due to the expenses associated with providing adequate housing, staffing, welfare, and medical care for its prisoners, in comparison with the number of potential claims by class members; and that the interests of the plaintiffs and class members to recover damages against the defendants in their official capacities is required to be reasonably and fairly balanced against the significant public interest involved in insuring the viability of the continued operations of the duties and functions of the OPCSO.

6. Additionally, the Court makes a preliminary finding that the proposed settlement provides for a mathematical formula for the calculation and distribution of monetary relief to Class Members² which is fair, reasonable and equitable and, as contemplated by the settlement, is well within the range of comparable strip search settlements which have been approved by other courts.

7. Accordingly, the Court finds that this class action meets the criteria for certification under Fed. R.Civ.P. 23(b)(3) as a damage class and certifies the class and sub-classes as set out below and in the Settlement Agreement (hereafter referred to collectively as the "Class/Sub-Classes"):

CLASS: Every person arrested only on "minor offenses" (as defined below) who entered the Intake and Processing Center ("IPC") operated by the Orleans Parish Criminal Sheriff's Office ("OPCSO"), during the time periods set forth below, who was required to submit to any or all of the following procedures, prior to his or her first court appearance or release, whichever came first, pursuant to a blanket policy, practice or custom of the OPCSO applicable to all arrestees to be admitted to the general population of the jail:

²Unless the context otherwise requires, "Class Member" shall mean a putative or actual member of any of the Sub-classes now or hereafter certified in this case.

Sub-Class "A" (or the "Kelly" class):

(A) The removal or rearrangement of some or all of the arrestee's clothing, including undergarments, in the presence of OPCSO deputies and/or other detainees, resulting in the exposure of the arrestee's genital area, anus, buttocks, and/or breasts (in the case of female arrestees) and the subsequent visual inspection of the arrestee's private parts by OPCSO deputy or deputies, which occurred from April 25, 1999 through February 14, 2002;

Sub-Class "B" (or the "Change-Out" class):

(B) The removal or rearrangement of some or all of the arrestee's clothing, including undergarments, in order to change into OPCSO supplied garments under circumstances which allowed OPCSO deputies and/or other detainees the ability to view his or her genital area, anus, buttocks and/or (in the case of female arrestees) breasts, which occurred from February 15, 2002 through May 31, 2002;

Sub-Class "C" (or the "Contempt" or "Templeman III" class):

(C) The removal or rearrangement of some or all of a male arrestee's clothing or clothing furnished by OPCSO including undergarments, in the presence of OPCSO deputies and/or other detainees, which resulted in the exposure of the arrestee's genital area, anus, and/or buttocks to others in violation of the Court's Order of May 20, 2002 as the arrestee was being admitted to the receiving tier at Templeman III from the IPC, which occurred from June 1, 2002 through May 31, 2003.

As used herein "minor offenses" includes one or more traffic offenses, misdemeanors, petty offenses, or violations of municipal or parish ordinances, none of which involves weapons or controlled dangerous substances. This definition specifically excludes any and all felonies.

As used herein "visual inspection of the arrestee's private parts" means inspection of the arrestees' genitalia, buttocks, anal cavity, vaginal cavity and/or female breasts by an OPCSO deputy or deputies.

Whether or not an individual qualifies as a Class Member will be based upon the records of the OPCSO; if the OPCSO records do not confirm that the individual fits within one of the Sub-Class definitions above, his or her claim will not be allowed.

8. The Court has been advised that on September 24, 2004, the OPCSO deposited the sum of Nine Million Three Hundred Seventy-Five Thousand Dollars and No/100ths (\$9,375,000.00) together with interest earned thereon since June 2, 2004, into an interest bearing account entitled "Orleans Parish Strip Search Settlement Fund" (hereafter referred to as the "Settlement Fund") with Hibernia National Bank (hereafter referred to as the Escrow Agent). The terms of the Settlement Agreement shall govern this Settlement Fund and are adopted and incorporated herein. On October 4, 2005 the Court issued an order permitting the OPCSO to borrow the sums of money in the Settlement Fund in response to the emergency conditions which existed following the Hurricane Katrina disaster (Docket No. 144). That order set forth the terms for handling and restoration of those sums, and OPCSO returned to the Settlement Fund the sums borrowed on October 4, 2006, including interest earned, as per the Court's order. OPCSO complied with all of the terms of the Court's order for the handling and restoration of the Settlement Fund.

9. The Court finds that the Plaintiffs, Jeff Brite, William Brice White III, Lionel Nelson, George Wurz, Anthony Pogorzelski, Kendra Spencer, Tony Buchen, and Sylvia Brown are adequate class representatives for the Class/Sub-classes certified herein and are confirmed as such and reappointed herein. The Plaintiffs' request for incentive awards to the individual class representatives varying from \$5,000.00 to \$20,000.00 per person based upon the individual class

representative's involvement and participation in representing the Class/Sub-classes in this litigation shall be heard at the fairness hearing set herein.

10. The Court further finds that Plaintiffs' Counsel, Samuel S. Dalton (LSBA# 4473), Mary E. Howell (LSBA# 7030), D. Majeeda Snead (LSBA# 15052), and Christina R. L. Norris (LSBA# 14270) are adequate Class Counsel, are confirmed as such and reappointed as Class Counsel to enforce and implement the Settlement Agreement approved herein.

11. The Court finds that Sheriff Marlin N. Gusman, as Criminal Sheriff of Orleans Parish, has the legal obligation, created by his predecessors prior to his tenure as Criminal Sheriff, as well as full authority as Criminal Sheriff of Orleans Parish, to execute the Settlement Agreement and that the obligations of settlement created prior to Sheriff Gusman's tenure, by his predecessors in office, as set forth in the Settlement Agreement, are binding not only on Sheriff Gusman as Criminal Sheriff of Orleans Parish, but on all successor Criminal Sheriffs as well.

12. The Court finds that this case has been vigorously litigated by the parties for more than six (6) years and that Plaintiffs actively monitored the operations of the OPCSO relative to strip and visual body cavity searches for over two (2) years pursuant to orders of this Court; that the injunctive relief obtained by Plaintiffs has substantially altered the policies, practices and procedures of the OPCSO; that the sum to be paid by the Defendants to the Plaintiffs' Class/Sub-classes for the Plaintiffs damages is a fair and reasonable sum, and that the proposed settlement is in the best interest of all parties.

13. The Court approves written notice in a form substantially similar to the Class Action Notice (Long-Form) and the Class Action Notice (Short-Form) attached to the Settlement Agreement as Exhibits B and B-1, respectively. The Court finds that the Notices are accurate,

objective, informative and provide the Class Members with all of the information necessary to make an informed decision regarding participation in the settlement, the terms of the settlement and its fairness. The Court further approves the Proof of Claim and Release (“Proof of Claim”) attached to the Settlement Agreement as Exhibit C. The Court also approves the notice plan as set forth in the Settlement Agreement.

14. Defendants are ordered to provide whatever timely assistance is necessary and feasible to accommodate and facilitate a reasonable and cost-effective administration of the proposed settlement.

15. The Court takes note that defendants have already provided Class Counsel and the Claims Administrator with sufficient and adequate information, including a useable data base containing pertinent information, such as name, address, phone number, Social Security number, date of birth, I.D. number, OPCSO unique identifier number, folder number, date of arrest, offenses charged, booking date, location/transfer information, and date and time of first court appearance or release, of every Class Member, in order to facilitate efforts to identify and locate Class Members and to confirm arrest, booking, location, transfer and first court appearance or release information, including dates and times of such events.

16. The Court approves Class Counsel’s retention of Analytics, Inc. as claims administrator and disbursing agent (hereinafter referred to as the “Claims Administrator”) in accordance with the terms of the Settlement Agreement and this Order.

17. Beginning no later than _____, 2007, Class Counsel shall cause Notice to be disseminated in the manner set forth in the Settlement Agreement and as advised by the Claims Administrator. Prior to the fairness hearing, the Claims Administrator shall serve and file a sworn

statement attesting to compliance with this paragraph. To be timely filed, a Proof of Claim must be received by the Claims Administrator by the Claim Date, which is _____, 2007. Facsimile or electronic mailings are not acceptable and will not be considered. If a Proof of Claim is rejected as deficient, the claimant shall be notified in writing by the Claims Administrator mailing the claimant a Request for Cure on or before _____, 2007, and the claimant shall be given an opportunity to cure the deficiency, if possible. The deadline for the Response to Request for Cure to be received by the Claims Administrator is _____, 2007. The Request for Cure shall be treated as described in the Settlement Agreement.

18. The notices to Class Members described in the Settlement Agreement will inform Class Members that they have the right to exclude themselves (“opt-out”) from the Settlement Agreement. Class Members may exercise that right by submitting a written Request for Exclusion (“opt-out”) stating unambiguously their desire to opt out of the settlement, which must be received by the Claims Administrator by _____, 2007. Facsimile or electronic mailings are not acceptable and will not be considered. Any class member requesting exclusion (“opt-out”) must sign the request personally, and provide a date of birth, mailing address and a phone number where he or she can be contacted. By filing a Request for Exclusion an individual is asserting that he or she is a member of at least one of the three Sub-Classes certified in this lawsuit.

19. Requests for Exclusion, must also be mailed to Class Counsel and Counsel for Defendants at the addresses listed below:

Plaintiffs’ Class Counsel:

Samuel S. Dalton
Attorney at Law
P.O. Box 10501

Defendants’ Counsel:

T. Allen Usry
Usry, Weeks & Matthews
1615 Poydras St., Suite 1250

20. The Court will consider the timeliness and validity of all Requests for Exclusion at the Fairness Hearing. If an individual requesting exclusion wishes to be heard at the Fairness Hearing, he or she must file a Notice of Intent to Appear with the Claims Administrator on or before _____, 2007, with copies to Class Counsel and counsel for the defendants as listed above. Should any one or more Class/Sub-Class Members file a Request for Exclusion which is found by the Court to be timely and valid, then the Criminal Sheriff in office at the time of the Court's ruling may elect to withdraw from the Settlement Agreement.

21. A hearing on final settlement approval (the "Fairness Hearing") is hereby scheduled to be held before the Court on _____, 2007 at ____m. to consider the fairness, reasonableness, and adequacy of the proposed settlement and the entry of final judgment. Class Counsel's application for an award of attorneys' fees in the amount of thirty-seven (37%) percent of the Settlement Fund, plus costs and expenses, including experts and consultants fees (plus interest on such attorneys' fees, costs and expenses at the same rate and for the same periods as earned by the Settlement Fund) as set forth in the Settlement Agreement, shall be heard at the time of the Fairness Hearing.

22. At the Fairness Hearing the Court will also consider the request for incentive awards to the Class Representatives (plus interest on such award at the same rate and for the same periods as earned by the Settlement Fund) as set forth in the Settlement Agreement.

23. The date and time of the Fairness Hearing shall be set forth in the Notices. The Fairness Hearing shall be subject to adjournment by the Court without further notice to the members of the settlement class other than that which may be posted by the Court.

24. Any Class Member may, but need not, enter an appearance through his or her own attorney. Class Members who do not enter an appearance through their own attorneys will be represented by Class Counsel.

25. Any Class Member may, but need not, submit written objections to the proposed Settlement Agreement, Class Counsel's application for fees and expenses, or the incentive awards for the Class Representatives by filing same with the Claims Administrator on or before _____, 2007 with copies to Class Counsel and Defendants' counsel at the addresses listed above.

26. Any Class Member making an objection (an "Objector") must sign the objection either personally or through his or her counsel. An objection must state why the Objector objects to the proposed settlement, or to the fee or award amount, and provide the basis to support such position, inclusive of identification of any documents and case law upon which he or she intends to rely to support the objection. If an Objector intends to appear at the Fairness Hearing, the Objector must also file a written Notice of Intent to Appear with the Claims Administrator on or before _____, 2007, with copies to Class Counsel and Defendants' counsel at the addresses listed above.

27. If any Class Member desires to appear at the Fairness Hearing to speak in support of the settlement, he or she must also file a written Notice of Intent to Appear with the Claims Administrator on or before _____, 2007, with copies to Class Counsel and Defendants' counsel at the addresses listed above.

28. If counsel is appearing on behalf of one or more Class Members, counsel must identify each such Class Member, and each Class Member must have complied with the requirements of this Order. These documents must be filed with the Claims Administrator at the following address:

OPCSO Strip Search Claims Administrator
P.O. Box 2007
Chanhassen, Minnesota 55317-2007

29. Objections, with copies of supporting documents and case law, along with any notices of intent to appear, must also be mailed to Class Counsel and Counsel for Defendants at the addresses listed below:

Plaintiffs' Class Counsel:

Samuel S. Dalton
Attorney at Law
P.O. Box 10501
Jefferson, LA 70181

Defendants' Counsel:

T. Allen Usry
Usry, Weeks & Matthews
1615 Poydras St., Suite 1250
New Orleans, La. 70112

30. Only Class Members who have filed and served valid and timely objections and notices of intent to appear shall be entitled to be heard at the Fairness Hearing. Any Class Member who does not timely file and serve an objection in writing to the proposed Settlement Agreement, to entry of final order and judgment, to Class Counsel's application for fees, costs and expenses, or to the request for incentive awards for the Class Representatives in accordance with the procedure set forth in the Notice and mandated in this Order, shall be deemed to have waived the right to assert any such objection by appeal, collateral attack, or otherwise.

31. Class Members need not appear at the hearing or take any other action to indicate their approval of the Settlement Agreement, other than execution and timely filing of the Proof of Claim approved in this Order.

32. If the Settlement Agreement is terminated or the settlement is not consummated for any reason whatsoever, including if: (a) a final and definitive order is entered by the Court disapproving the settlement on the terms set forth in the Settlement Agreement and the time to seek further appeal or review of such order has passed or such order has been affirmed on appeal or review by the highest court having authority to do so; or (b) any one or more Class/Sub-class Member(s) files a Request for Exclusion or opt out which is found to be timely and valid by the Court, and the Criminal Sheriff in office at the time of the Court's ruling elects to withdraw from the Settlement Agreement, then in any such event the entire settlement contemplated in the Settlement Agreement shall be null and void, with full reservation of all rights of all parties herein.

33. In the event that the Settlement Agreement is terminated or is not consummated for any reason whatsoever, the Releases (if any) in the possession of the Claims Administrator, shall be rendered null and void.

34. If the Settlement Agreement is terminated or is not consummated for any reason whatsoever, the certification of the Class/Sub-classes pursuant to Rule 23(b)(3) only shall be null and void and the Settlement Fund, including all interest, income and net gains realized thereon, less any costs, fees or taxes paid or payable, shall be returned forthwith to the OPCSO, upon order of the Court. Amounts expended or obligations incurred for notices and administration costs, expenses and fees, shall not be refunded and OPCSO shall have no claim for reimbursement thereof from Class Counsel, Class Representatives, or any Class Members, none of whom shall have any

responsibility or liability of any nature whatsoever for any and all expended or then accrued amounts, and the litigation shall resume as if the proposed settlement never existed.

35. All Class Members are enjoined from filing any suit or proceeding on any existing suit against the Defendants on any claim concerning the policies and practices at issue in this case until such time (if any) that (a) such Class Member(s) has/have opted out or excluded himself or herself from this case or (b) an appellate court having authority to review the proposed settlement has entered an order disapproving it and the time to seek further appeal or other review has expired.

36. Upon entry of this Order approving the Settlement Agreement, each and every term and provision of the Settlement Agreement shall be deemed incorporated as if expressly set forth herein, and shall have the full force and effect of an order of this Court. The Settlement Agreement, its exhibits and other documents referenced therein, including all dates and deadlines set forth therein, may be amended or modified by the Court upon consent of Class Counsel and Defendants' Counsel, without further notice to the Class Members unless the Court requires such notice.

37. All reasonable costs and expenses incurred in notifying Class Members, as well as in administering the Settlement Agreement, shall be paid as set forth in the Settlement Agreement.

38. In the event that Plaintiffs incur any additional attorneys' fees and costs to seek enforcement or collection of this Settlement Agreement against Defendants because of a default by any Defendant in the timely payment or performance of any Defendant's obligations under the Settlement Agreement, it is acknowledged that the plaintiffs have substantially prevailed on the

merits and that OPCSO will be responsible for payment of reasonable attorneys fees and costs to plaintiffs as approved by the Court pursuant to 42 USC §1983 and §1988 for those additional enforcement and/or collection efforts. The Defendants reserve all other defenses to any such claim for additional attorneys fees and costs.

39. If the parties are unable to agree as to the appropriate distribution of any funds which, for whatever reason, remain in the Settlement Fund after completion of the distribution, the Court specifically reserves that issue for decision at a later date, when it becomes appropriate and necessary to resolve it.

IT IS SO ORDERED

_____, 2006
New Orleans, Louisiana

The Honorable Alma L. Chasez
Chief Magistrate Judge