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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Damian Hart, et al.,

Plaintiffs,

v.

Maricopa County Sheriff's Office, Joe Arpaio, the duly Elected Sheriff of Maricopa County, et al.,

Defendants.

Cause No. CIV-1977-00479-PHX-EHC

DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED SEPTEMBER 30, 2005

(Assigned to the Honorable Earl H. Carroll)

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Defendants Maricopa County Board of Supervisors (the "County") and Maricopa County Sheriff's Office ("MCSO"), by and through undersigned counsel, respectfully submit their Response to Plaintiffs' objections to the September 30, 2005 Order by the Honorable Morton Sitver (the "Order") (Doc. #1105).

I. INTRODUCTION

On January 26, 2005, this Court referred a host of pending motions to the Honorable Morton Sitver, including "Plaintiffs' Motion for Partial Judgment Pursuant to Fed.R.Civ.P. 52(c)." A list of the fifteen motions that were pending before Judge Sitver at the time the Order was filed is set forth on pages 1-2 of the Order. Defendants' "Pre-hearing Memorandum and Renewed Motion for Order to Terminate the Amended Judgment" (Doc. # 906), filed on November 14, 2003, has not been decided..

In any event, Plaintiffs were provided ten (10) days from the Order to file specific written objections with the Court pursuant to 28 U.S.C. § 636(b)(1), Fed.R.Civ.P. 72, 6(a), and 6(e). The Magistrate Judge's recommendations are reviewed *de novo* by the District Court. Fed.R.Civ.P. 72(b). "The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." *Id.* We urge the Court to adopt the Magistrate Judge's findings and recommendations.

Plaintiffs have filed objections to the Magistrate Judge's recommendations based on five alleged problems. In sum, Plaintiffs claim that the Magistrate Judge applied erroneous legal standards, and therefore, the Magistrate Judge improperly denied Plaintiffs' Motion for Partial Judgment (Doc. # 946). However, as discussed below, the Magistrate Judge applied the correct legal standards and properly decided Plaintiffs' Motion because Plaintiffs have not shown any systemic, current and ongoing constitutional violations at the jails. Importantly, the Order requires Plaintiffs to file an omnibus motion to show "[t]he basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing...." (Order at 35) (emphasis in original).

For reasons set forth more fully below, the Court should accept and adopt the Magistrate Judge's recommendations and findings and deny Plaintiffs' Motion for Partial Judgment (Doc. #

946). This Court should also rule on Defendants' Motion for Termination that has been pending since November 2003.

II. ARGUMENT

A. The Magistrate Judge did not err in applying the Eighth Amendment "deliberate indifference" standard to the claims of pretrial detainees

The Magistrate Judge properly applied the deliberate indifference standard in his Order. Order at 27 n. 12 citing *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979); *Carnell v. Grimm*, 74 F.3d 877, 979 (9th Cir. 1996). The constitutional standard for pretrial detainees is the "deliberate indifference" standard established in *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). *See also*, *Carnell v. Grimm*, 74 F.3d 877, 979 (9th Cir. 1996); *Young v. Armontrout*, 795 F.2d 55, 56 (8th Cir. 1986); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982). This standard applies to class-wide concerns as well as to the treatment of individuals. *Toussaint v. McCarthy*, 801 F.2d 1080, 1111-1113 (9th Cir. 1986) (deficiencies in the prison's overall access to medical and psychiatric care, use of unqualified medical personnel, lack of confidentiality of records, lack of special medical diets, and deficient medical facilities did not amount to institutional deliberate indifference and, thus, did not violate constitutional requirements).

Without naming or articulating a new standard, and ignoring the case law cited by the Magistrate Judge in the Order, Plaintiffs have criticized the deliberate indifference standard on the grounds that pretrial detainees are not convicted prisoners who should be subject to this standard. Plaintiffs cite *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003) for the proposition that "the substantive due process rights of incapacitated criminal defendants are not governed solely by the deliberate indifference standard." (Emphasis supplied). However, in *Oregon Advocacy Center*, the 9th Circuit considered the rights of *mentally incapacitated* criminal defendants and found the deliberate indifference standard is a minimum standard of care in the substantive due process context. *Id.* at 1121 n. 11. The Ninth Circuit did not fully address the

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substantive due process rights of defendants who were not mentally incapacitated. Therefore, *Oregon Advocacy Center* has no relevance to the instant proceedings.

Plaintiffs have also cited Jones *v. Blanas*, 393 F.3d 918 (9th Cir. 2004) in support of their objections, but the facts of *Jones* are also easily distinguishable from the facts of this case. In *Jones*, the Ninth Circuit considered the rights of a jail detainee who brought a civil rights action against the sheriff and county for violations of his constitutional rights during a period in which he was **civilly** confined awaiting adjudication and eventual commitment under the California Sexually Violent Predator Act. The Ninth Circuit stated:

> [T]he conditions of confinement for an individual detained under civil process but not yet committed must be tested by a standard at least as solicitous to the rights of the detainee as the standards applied to a civilly committed individual and to an individual accused but not convicted of a crime.
>
> At a bare minimum, then, an individual detained under civil process-- like an individual accused but not convicted of a crime--cannot be subjected to conditions that "amount to punishment."
>
> *Id.* at 932 (citations omitted).

The Court continued by stating that "[b]ecause [the jail detainee] is detained under civil--rather than criminal--process, an SVPA detainee is entitled to 'more considerate treatment' than his criminally detained counterparts." *Id.* The Court concluded by stating:

> Finally, we have held in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003) that the Eighth Amendment's "deliberate indifference" standard of culpability does not apply in the context of an incapacitated criminal defendant's Fourteenth Amendment challenge to conditions of confinement. *Id.* at 1120-21. If an incapacitated *criminal* defendant need not prove "deliberate indifference" to state a substantive due process claim, then neither should a *civil* detainee, who retains greater liberty protections than his criminal counterpart.
>
> *Id.* at 933 (citations omitted).

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Like *Oregon Advocacy Center*, the Court in *Jones* did not address the substantive due process rights of the general pretrial detainee population. In citing both cases, Plaintiffs have neglected to cite any case law which addresses the specific facts of the instant case. Plaintiffs have also failed to show any current, ongoing constitutional violations which could have supported entry of Partial Judgment in their favor. Accordingly, the Magistrate Judge properly denied Plaintiffs' Motion based on the deliberate indifference standard.

B. The Magistrate Judge did not err in requiring Plaintiffs to show municipal liability

The Magistrate Judge properly required Plaintiffs to show municipal liability. In his Order, the Magistrate Judge stated Plaintiffs could demonstrate that a municipality has inflicted a constitutional injury by showing either "that the municipality has either directly violated a constitutional right or ordered its employees to do so" or "by demonstrating that through its omissions, 'the county is responsible for a constitutional violation committed by one of its employees....'" Order at 25 citing *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175 (C.A. 9 Nev. 2002). Plaintiffs argue that Plaintiffs are not required to make any additional showings when they seek only injunctive relief. However, "[l]ocal governing bodies ... can be sued directly under § 1983 for monetary, declaratory, *or injunctive relief* where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. New York City Dep't of Social Servs.* 436 U.S. 658, 690 (1978). *See also*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (Civil rights actions for declaratory and injunctive relief on account of refusal to renew plaintiffs' liquor licenses); *Dirrane v. Brookline Police Dept.*, 315 F.3d 65 (1st Cir. 2002) (*Monell* precondition for imposition of municipal liability under § 1983 of unconstitutional "official municipal policy" applies to claims for monetary, declaratory, or injunctive relief). Plaintiffs must show that current, ongoing constitutional violations exist regardless of whether they are only seeking injunctive relief. As such, the Magistrate Judge did not err in requiring Plaintiffs to show municipal liability.

C. The Magistrate Judge's statement that Defendants may be entitled to qualified immunity is not fatal to the Order

In his Order, the Magistrate Judge found that "[a] prison official **may** be entitled to qualified immunity under certain circumstances." Order at 24 citing *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002) (citations omitted) (emphasis supplied). Plaintiffs have objected to this portion of the Order by suggesting that qualified immunity is not available for prospective relief, and Defendants agree that qualified immunity does not bar actions for declaratory or injunctive relief. *Greene v. Terhune*, 2 Fed.Appx 750 (9th Cir. 2001); *Prison Legal News v. Washington State Dept. of Corrections*, 11 Fed.Appx. 729 (9th Cir. 2001). However, this was not fatal or in any way dispositive in the Magistrate Judge's decision, and is harmless. Qualified immunity is a defense, not an additional hurdle imposed upon Plaintiffs. Indeed, the parties did not discuss this issue in any of their filings.

In accordance with the Prison Litigation Reform Act of 1996, 18 U.S.C. § 3626 *et seq.* ("PLRA"), the overarching issue to be addressed is whether there are any current and ongoing violations of the constitutional rights of pretrial detainees within the jails that is systemic. If such a current and ongoing violation is found to exist, then the Court can consider what prospective relief (if any) should be ordered, consistent with the PLRA's requirements. To date, Plaintiffs have failed to demonstrate any current and ongoing violations on any systemic level.

D. The Magistrate Judge did not require Plaintiffs to prove that actual harm has already occurred

Plaintiffs have misinterpreted the applicable standards in this case and have misunderstood the Magistrate Judge's Order. The PLRA requires that all provisions of the Amended Judgment (Doc. # 705) that are not constitutionally mandated be terminated as a matter of law. "With respect to consent decrees, ... any contractual surplusage (relief the Court had jurisdiction to enforce only by virtue of the parties' consent) is rendered unenforceable by the termination provisions" of the PLRA. *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000). Prospective relief "that exceeds the constitutional minimum must be terminated regardless of when it was granted." *Id.* at 999.

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The PLRA's mandate for termination is subject to one limitation: the statutory exception for narrowly tailored prospective relief that is necessary to correct a current and ongoing violation of constitutional rights. 18 U.S.C. § 3626(b)(3). Thus, the proper focus of Defendants' Motion to Terminate the Amended Judgment (Doc. # 906) is upon whether there are current and ongoing constitutional violations and, if so, what, if any prospective relief remains necessary to correct the identified violation and satisfy the three-fold statutory requirement that such relief "extends no further than necessary to correct the violations," is "narrowly drawn," and is "the least intrusive means to correct the violation." *Id.*; *Benjamin v. Fraser*, 343 F.3d 35, 39, 42-43, 57 (2nd Cir. 2003); *Cason v. Seckinger*, 231 F.3d 777, 780, 783-85 (11th Cir. 2000); *Gilmore v. California*, 220 F.3d 987, 997-99 (9th Cir. 2000). Quite frankly, no such relief is necessary at this time. Absent a finding of such a violation, any discussion of fashioning a remedy is merely speculative.

Plaintiffs have failed to show any current, ongoing, and systemic constitutional violations. As part of the 9/30/05 Order, probably recognizing the above, the Magistrate Judge granted Defendants' "Motion to Compel Compliance with the Court's 1/21/04 Order and to Require Specification of All Alleged Current and Ongoing Constitutional Violations (if any) in the Maricopa County Jails" (Doc. # 950). Towards that end, the Magistrate Judge further Ordered that Plaintiffs submit an omnibus motion that provides in part:

- A numbered list of **each** specific area of current constitutional concern specifically addressed in the Amended Judgment. In asserting allegations of unconstitutionality, Plaintiffs must take into account the recent opening of new jails.
- For **each** numbered area of constitutional concern:
    1. The basis of Plaintiffs' claim that a **systemic** constitutional violation is currently ongoing, including whether a county policy exists addressing the issue;

Order at 35-36 (emphasis in original).

The Court was correct and justified in this common sense approach. In the context of the Magistrate Judge's Order, however, Plaintiffs have provided no evidence that the jail's intake

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screening procedure now constitutes a systemic constitutional violation of rights that is ongoing. Indeed, the Magistrate Judge made clear that "the question before the Court, post PLRA, is whether the jail is complying with U.S. Constitutional standards." Order at 29. Plaintiffs have provided no evidence of any such violations, but will have an opportunity to clearly spell out such violations in their omnibus motion. Accordingly, the Magistrate Judge did not err. Plaintiffs have misinterpreted the proper standard that must be applied.

E. The Magistrate Judge did not err in concluding that Defendants' admitted practice of holding detainees overnight without providing beds is not unconstitutional

The Magistrate Judge did not err with respect to this portion of the Order because Plaintiffs have not demonstrated any constitutional violation. Plaintiffs cite *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1448 (9th Cir. 1989) for the proposition that "a jail's failure to provide detainees with a mattress and bed or bunk runs afoul of the commands of the Fourteenth Amendment." However, the facts of Thompson are not analogous to the situation addressed in the Maricopa County jails. In *Thompson*, the arrestee alleged "that the County failed to provide him with a bed or even a mattress for **two of the nights** spent in county jail and that consequently he was forced to sleep on the cement floor during those nights. He claims that such deprivation violated his right to due process guaranteed by the Fourteenth Amendment." *Id.* (emphasis supplied).

As noted by the Magistrate Judge, "Plaintiffs have not cited a case that stands for the specific premise that those pretrial detainees detained in an intake area *under* 24 hours must be provided a bed under the U.S. Constitution." Order at 26-27 (emphasis in original). Here, the uncontroverted evidence shows that pretrial detainees that remain in intake *over* 24 hours are provided a bed. 1/22/04 Trans. at 110:10-14, attached hereto as Exhibit 1. In fact, 99.9% of the inmates are in intake for less than 24 hours in the first place. 1/22/04 Trans. at 67:5-6, attached as Exhibit 1. Furthermore, with the opening of the new jails and intake area, these statistics have improved. Plaintiffs have not and cannot show that the few inmates who require more than 24

hours for completion of the intake process are denied beds. Even if we accepted such individual apocryphal tales it would not constitute an ongoing, systemic violation.

Moreover, the Magistrate did not err "in relying upon defendants' opening of additional jail facilities." Order at 27. As noted above in Section D., the proper focus here is upon whether there are current and ongoing constitutional violations. Plaintiffs cannot ignore the fact that new intake and jail facilities have opened. Plaintiffs must prove that there are current and ongoing constitutional violations at these new jail facilities, and Plaintiffs cannot merely assume that, in the absence of evidence of the operation of the new jails, constitutional violations exist. Just the contrary should be assumed. In light of the new facilities, new programs and new staff, Plaintiffs cannot demonstrate as a matter of fact or law that Defendants' housing policies result in current, ongoing, and systemic constitutional violations. Accordingly, the Magistrate Judge properly denied Plaintiffs' Motion for Partial Pretrial Judgment with respect to housing issues.

III. CONCLUSION

For the foregoing reasons, Defendants Maricopa County Board of Supervisors and Maricopa County Sheriff's Office respectfully request that the Court adopt the Magistrate Judge's recommendation, including that Plaintiffs' Motion for Partial Judgment (Doc. # 946) be denied in its entirety. This Court is further requested to rule on Defendants' Motion to Terminate and grant said Motion.

RESPECTFULLY SUBMITTED this 24th day of October, 2005.

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