80805

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION
CASE NO.: 4:03CV-3-M

EDWARD LEE SUTTON, LESTER H. TURNER,
LINDA JOYCE FORD, TIMOTHY D. MAY,
LADONIA W. WILSON, ROBIN LITTLEPAGE,
ROBERT R. TEAGUE, and TABITHA NANCE
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED PLAINTIFFS

v.

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTIONAND IN THE ALTERNATIVE, MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

HOPKINS COUNTY, KENTUCKY
AND
JIM LANTRIP INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY AS JAILER
OF HOPKINS COUNTY, KENTUCKY DEFENDANTS

Come the Defendants, Hopkins County, Kentucky and Jim Lantrip, in his individual and official capacities (hereinafter "Defendants"), by and through the undersigned counsel, and for their Response to Plaintiffs' Motion for Partial Summary Judgment and for a Preliminary Injunction and in the Alternative for their Motion for Partial Summary Judgment, hereby state as follows:

I. INTRODUCTION

Plaintiffs have filed a Motion for Partial Summary Judgment and a Preliminary Injunction claiming that Hopkins County Jail's (hereafter "Jail") former procedure of strip searching those inmates who were transferred from another county jail is unconstitutional. It is Defendants' position that the procedure was in fact constitutional and in accordance with Kentucky's Administrative Regulations. As such, Defendants

request that this Court deny Plaintiffs' Motion for Partial Summary Judgment and Preliminary Injunction. In the alternative, Defendants have filed a Motion for Partial Summary Judgment, asking this Court to find that the former procedure is constitutional and to dismiss those Plaintiffs and/or Class Members that were strip searched pursuant to this procedure.

II. COUNTER-STATEMENT OF FACTS

It is undisputed that, until recently, the Jail had a procedure of strip searching inmates who were transferred from another jail. (*See* Affidavit of Chris Fields, attached hereto as Exhibit "A"). However, in light of this suit, on May 25, 2006, the Jail adopted a more conservative strip search procedure which now only allows a strip search of a transfer from another facility if the criminal charges (past or present) invoke reasonable suspicion or of course, unless they fit into some other category.[1] (*See* Affidavit of Chris Fields).

Plaintiffs incorrectly state that "the decision to strip search an arrestee is made before obtaining a criminal history report on the subject." In fact, the Jail maintains a criminal history report in their computer system for every person arrested and booked into the Hopkins County Jail. When a person is brought into the jail, whether as an initial arrestee or a transfer from another institution, that person's criminal history in Hopkins County is reviewed to determine if his/her criminal history would invoke reasonable suspicion to strip search. (*See* Lantrip Depo., p. 14, attached hereto as Exhibit "B") ("[I]f they've been arrested in our jail and brought to our jail, booked in before, it would show their previous arrests in the computer."). Furthermore, during the booking process, the

[1] It should be noted that Defendants changed this portion of the strip search procedure pursuant to the undersigned's advice that because no court has ruled on this issue, they should refrain from strip searching persons upon transfer from another jail until this Court can address the issue.

inmate is asked about his criminal history. (Lantrip depo., p. 16, attached hereto as Exhibit "B").

Accordingly, even if the Jail did not previously have a procedure of strip searching every inmate upon transfer from another facility, it is likely that an inmate might be strip searched for any number of other reasons, such as current or past criminal charges, refusing to submit to a pat down search, identified as a suicide risk, or other circumstances that would invoke reasonable suspicion.

The Jail implemented the former procedure on transfers because such an inmate was exposed to areas to which the public had access before and/or during the transfer, increasing the likelihood that the inmate could possess contraband (weapons, drugs, cigarettes, etc.). The procedure was implemented in light of the following language in the Kentucky Administrative Regulations:

> (b) A prisoner may be strip searched only on reasonable suspicion . . . . Reasonable suspicion shall be based upon one (1) or more of the following:
>
> 1. A current offense involving felony violence, drug charges, or fugitive status;
> 2. A criminal history of offenses involving the use of a weapon or the possession of contraband;
> 3. Institutional behavior, reliable information, or history that indicates possession or manufacturing of contraband, the refusal to submit to a clothed pat down search, or a clothed pat down search reveals the possession of contraband;
> 4. Contact with the public by a contact visit, court appearance that takes place in an area to which the public may have access, or *after transport from or through an area to which the public may have access*; or
> 5. The court has ordered commitment to custody after arraignment, conviction, sentencing, or other court appearance, and the prisoner was not in custody prior to the court appearance.

501 KAR 3:120(3)(b) (emphasis added) (attached hereto as Exhibit "C").

III. ARGUMENT

A. Because the procedure is no longer in effect, this Court cannot declare it unconstitutional.

Plaintiffs request an order from this Court declaring the procedure of strip searching inmates following transfer to unconstitutional. However, this Court is barred from doing so under the circumstances. In ***Brandywine, Inc. v. City of Richmond, Ky***, the Sixth Circuit was asked to declare the City's zoning ordinance as it applied to Brandywine, Inc., an adult bookstore, unconstitutional. 359 F.3d 830 (6th Cir. 2004). After suit was filed, Richmond amended the ordinance, effectively repealing the provision that prohibited Brandywine, Inc. from operating where it was located. ***Id.*** at 833-34. The Sixth Circuit held that "[w]e can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." ***Id.*** at 836.

As stated previously, the Defendants have amended the procedure at issue such that persons who are transferred from other detention facilities are only strip searched if their past or current criminal charges invoke reasonable suspicion or if they fit into one of the other categories listed in this procedure that mandate a strip search. (*See* Exhibit "A"). As such, the challenged procedure "is no longer in effect." Pursuant to the dictates of the Sixth Circuit, as a result, this Court cannot declare the procedure unconstitutional. Defendants request that Plaintiffs' Motion for Partial Summary Judgment be denied.

B. Defendants are nevertheless entitled to a ruling that their past practice was constitutional in accordance with the Supreme Court's rulings on these issues.

Any analysis of a strip search policy must start with a consideration of the seminal U.S. Supreme Court case on the subject, ***Bell v. Wolfish***. 441 U.S. 520 (1979). In reviewing the many constitutional claims in that case, the Supreme Court recognized that:

> The problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

Id. at 547-58.

In ***Bell***, the Court was asked to consider whether a strip search of every jail inmate following a contact visit was constitutional where there was no reasonable belief to indicate that the inmate was concealing contraband. In that case, the Court employed the following balancing test:

> 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 is conducted.

Id. at 559. The Court further noted that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." ***Id.*** In addition, the Court stated that the fact that only one inmate had been "discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to a lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." After balancing the significant and legitimate security interests of the institution in strip searching all inmates following a contact visit with the privacy interests of the inmates, the Court determined that the strip

searches of inmates following contact visits were lawful. ***Id.***

In 1987, the Supreme Court was again faced with a constitutional challenge to prison administration policies and rules in ***Turner v. Safley***. 482 U.S. 78 (1987). Although this case did not involve a challenge to a strip search policy, the Court did however, again discuss a court's role in considering a constitutional challenge to a prison's policies and procedures and the type of scrutiny that should be undertaken. The ***Turner*** Court recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." ***Id.*** at 84 (*quoting* ***Procunier v. Martinez***, 416 U.S. 396, 405 (1974). The Court further stated that:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

Id. at 85.

The Court then discussed the proper standard of review in cases involving questions of prisoners' rights. In doing so, the Court held that the test is not one of strict scrutiny but is as follows: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." ***Id.*** at 89. For purposes of determining whether the regulation is reasonable, the Court set forth four factors to be considered: First, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." ***Id.*** at 89-90 (*quoting* ***Block v. Rutherford***, 468 U.S. 576 (1984)). Second, the Court must consider the existence of alternative means for inmates to exercise their constitutional rights. In considering this factor, "courts should be

particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" ***Id.*** at 89-90 (and ***Jones v. North Carolina Prisoners' Union***, 433 U.S. 119 (1977)). Third, courts must consider the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources. And fourth, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

> This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 90-91. In ***Cornwell v. Dahlberg***, the Sixth Circuit reversed a lower court's ruling in a strip search case for failing to take into consideration the four ***Turner*** factors. 963 F.2d 912 (6th Cir. 1992).

Plaintiffs cite ***Masters v. Crouch***, a Sixth Circuit opinion, which held that "a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no individualized reasonable suspicion that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable." 872 F.2d 1248, 1255 (6th Cir. 1989). However, the reasoning in ***Masters*** is inapplicable to this case, since the search in ***Masters*** was part of the *initial* booking procedure following the prisoner's *arrest*. Defendants' policy is in accordance with this ruling. It allows a strip search of a person who is arrested and *initially* brought to the Hopkins County Jail *only* if they have past or present drug charges or past or present weapons charges or if some other factors invoke reasonable suspicion. As such, their

policy is in conformance with the ***Masters***' holding. (*See* Old and New Policies, attached to Chris Fields' Affidavit, attached hereto as Exhibit "A").

Defendants' procedure at issue herein is not a blanket policy of strip searching all inmates as was addressed in ***Masters.*** Rather, Plaintiffs challenge the Jail's procedure of strip searching only those inmates who were arrested in a county outside of Hopkins County, held in a detention facility there, and then transported (within a few hours, days, weeks, months, or even years) to the Hopkins County Jail on charges pending in Hopkins County. The "legitimate penological" reasons for strip searching those inmates are the fact that, during their previous incarceration and/or transport to Hopkins County, they were in "areas to which the public may have access." 501 KAR 3:120(3)(b). As such, these inmates are different from those that are strip searched during the initial booking process following arrest, as those persons, prior to their arrest, did not know they were going to jail and therefore did not have sufficient time, nor an opportunity to access areas where contraband could be found. In other words, in situations such as those posed in ***Masters***, the deterrent rationale for the ***Bell*** search is simply less relevant given the essentially unplanned nature of the arrest and subsequent incarceration. *See* ***Giles v. Ackerman***, 746 F.2d 614, 617 (9th Cir. 1984) (*overruled on other grounds*).

In light of these concerns, courts in this circuit have consistently held that inmates who leave the confines of a Jail may be subjected to strip searches upon their return without regard to their criminal charges or history given the time and opportunity such inmates have for obtaining and/or hiding contraband. In ***Richerson v. Lexington Fayette Urban County Gov't***, Judge Forester held that where inmates are allowed to leave a jail facility for purposes of a court appearance and therefore have access to areas to which the

public also has access, "a policy of strip searching the detainees upon their return from the courthouse and prior to being placed back in the general population of the detention center is both justified and reasonable." 958 F.Supp. 299, 307 (E.D. Ky. 1996). Whether there was individualized reasonable suspicion was irrelevant to that Court's ruling.

In 1993, the Sixth Circuit (in an unpublished opinion, attached hereto as Exhibit "D"), held that, regardless of the criminal charges or whether there is individualized reasonable suspicion, a "prison regulation of requiring strip searches . . . before and after appointments scheduled outside the prison is justifiable and is not an exaggerated response to prison concerns." ***Mowatt v. Visser***, 14 F.3d 602 (6th Cir. 1993).

Again, in an unpublished opinion, in the case of ***Black v. Franklin County, Kentucky*** (attached hereto as Exhibit "E"), Judge Hood dismissed claims of inmates who alleged an unlawful strip search after returning to jail from work release and after returning to jail from court appearances (even though they had been under the supervision of the jail employees the entire time), determining that such searches were reasonable. 2005 WL 1993445 (E.D. Ky. 2005).

Other Circuits agree. In ***Goff v. Nix***, the Eighth Circuit held that visual body cavity searches by prison officials before and after visits to the prison infirmary, which was located outside the secure walls of the main prison, was not a violation of the Fourth Amendment. 803 F.2d 358 (8th Cir. 1987). In that case, the prisoners were in restraints and under constant supervision the entire time that they were in the infirmary. Nevertheless, the Court held that "prison officials have legitimate security concerns due to the availability of weapons and because the infirmary is not as secure as most other portions of the institution." ***Id.*** at 369. Further, the Eighth Circuit recognized that the

"medical personnel at the infirmary are provided under contract and may not be as sensitive to security precautions as the prison administrators would desire." ***Id.*** In addition, the Eighth Circuit held that strip searches following court appearances did not violate the Fourth Amendment. ***Id.***

Similarly, in ***Michenfelder v. Sumner***, the Ninth Circuit held that a strip search policy that required a visual body cavity search every time the prisoner left or returned to his cell, as well as after movement under escort was reasonably related to the prison's legitimate penological interests and did not violate the Fourth Amendment. 860 F.2d 328 (9th Cir. 1988).

In ***Peckham v. Wisconsin Dept. of Corrections***, the Seventh Circuit held that a prison's policy of strip searching an inmate following a court appearance, medical appointment, or a contact visit did not violate the inmate's constitutional rights. 141 F.3d 694 (7th Cir. 1998). The inmates' criminal histories were irrelevant.

In ***Dougherty v. Harris,*** the Tenth Circuit held that a prison's policy of strip searching inmates following court appearances was constitutional. 476 F.2d 292 (10th Cir.), *cert. denied,* 414 U.S. 872 (1973).

Also, in ***Arruda v. Fair***, the First Circuit held that the prison's policy of strip searching inmates when they left and re-entered their cell following a visit to the prison law library and infirmary did not violate the Fourth or Eighth Amendments. 710 F.2d 886 (1st Cir. 1983). This was true even though guards accompanied the inmate to and from the library and infirmary.

Thus, numerous federal courts from several circuits have recognized the legitimate security interests of a jail in strip searching inmates coming from places not

secured by jail personnel, including less secure areas of a detention facility. Consistent with these decisions, and as will be discussed in more detail, a jail has a legitimate security concern when receiving transfers from other detention facilities over which the jail has no control and who may have been in areas accessible to the public.

C. Applying the Supreme Court's tests to the facts of this case, Defendants' former strip search policy of persons transported to the Hopkins County Detention Center from other detention facilities is constitutional.

Applying the ***Bell v. Wolfish*** and ***Turner v. Safely*** tests, it is without a doubt that the Defendants' former procedure of strip searching those inmates that are transferred from other detention facilities is constitutional. The ***Bell*** test requires this Court to balance "the need for the particular search against the invasion of personal rights that the search entails." In doing so, this court must consider: (1) the scope of the particular intrusion; (2) the manner in which it is conducted; (3) the justification for initiating it; (4) and the place in which it is conducted.

In general, the strip search procedure at the Jail following transfer can be gleaned from a review of the testimony of Plaintiff Robert Teague, who was strip searched following a transfer from another detention facility. Robert Teague testified that in 2003 he was arrested in Christian County, Kentucky for possession of marijuana and drug paraphernalia. (Teague depo., pp. 29-31). He was lodged in the Christian County Jail where he was not subject to a strip search even though he had a pending drug charge. (Teague depo., p. 31).

The following day he was transported to court where he pled guilty to the charges. Upon his return to Christian County Jail, he was again not strip searched. He was then served with an outstanding warrant from Hopkins County for theft by deception. He was

held at the Christian County Jail until a transport officer arrived to take him to the Hopkins County Jail. (Teague depo., p. 32). Upon arrival at the Hopkins County Jail and following booking, Teague was taken into a small room (the property room) by a male deputy jailer for purposes of changing into a jail uniform. He was placed behind a curtain and asked to remove his street clothes. He was told to show the bottom of his feet, bend over, spread his buttocks, cough, and then hold up his scrotum. Thereafter, he was given jail clothes to put on and was taken to a general population cell. (Teague depo., p 36). The deputy jailer was the only one in the room during the strip search and did not touch Teague at anytime. (Teague depo., pp. 35-36).

The scope and manner of the strip search following a transfer, as well as the place conducted (the first, third, and fourth factors of the ***Bell*** test), were clearly reasonable. The inmate was searched by a jailer of the same sex during a change out procedure, in a room out of view of other persons, and the inmate was not touched by the deputy jailer in the process.

The second factor, i.e., "justification for initiating [the search]" outweighs any invasion of the inmates' personal rights. Obviously, the justification for a strip search following transfer from another detention facility is to prevent the introduction of contraband into the facility that could expose the inmates and staff to harm. An inmate who has been incarcerated in another detention facility has possibly been exposed to contraband, especially if that detention facility has lenient procedures upon intake, as well as after contact visits, court appearances, medical appointments, and work programs. Just a few years ago, the Crittenden County Jail was searched by law enforcement agencies, with guns, alcohol, and unauthorized visitors being found in and among the

general population areas. (*See* Affidavit of James Lantrip, attached hereto as Exhibit "F" and newspaper articles, attached hereto as Exhibit "G"). Crittenden County is only a few miles from the Hopkins County Detention Center and is one of the facilities that frequently transferred inmates to Hopkins County. (*See* Affidavit of James Lantrip).

It is unknown how many other detention facilities in Kentucky have similar lax procedures. A County should not have to rely on the security procedures of another detention facility. There is no way of knowing what those procedures are and if they are in fact utilized and/or enforced by the transferring detention facility. The safety of the Jail's staff and inmates are at risk, which must be protected.

For the same reasons, the Kentucky Corrections Cabinet does not rely on the searching procedures of other detention facilities. Their strip search procedure requires all inmates to be strip searched upon transfer from another detention facility --- "All inmates shall be subject to a strip search if . . . entering . . . an institution."[2] (*See* Kentucky Corrections Search Policy, attached hereto as Exhibit "H").

Obviously, an inmate in a detention facility has had ample opportunity to realize that he is incarcerated, may continue to be incarcerated, and therefore has had ample time to hide contraband on his person. Furthermore, if that inmate is incarcerated in a facility that allows smoking, he has been around and/or had possession of cigarettes, which are considered contraband at the Hopkins County Jail. (*See* Affidavit of James Lantrip, attached hereto as Exhibit "F"). Hopkins County was the first detention center in Kentucky to go smoke free. In addition, many detention facilities today still allow smoking.

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[2] The Corrections Cabinet does not receive inmates directly upon arrest but only after the inmate has been held in a county detention center for several months or sometimes even years.

The justification for the strip search can be found in the Kentucky Administrative Regulations directed to local jails, which specifically provide that an inmate may be strip searched "*after transport from or through an area to which the public may have access*." Plaintiffs' own expert testified that the Kentucky Administrative Regulation applicable to strip searches is "very good" and that every jail should "adopt it as their policy." (Kamka depo., pp. 24-25, attached hereto as Exhibit "I").

It is without question that inmates transported from one county to another are likely transported "from or through an area to which the public may have access", such as jail lobbies, parking lots, unsecured transport vehicles, as well as restrooms, restaurants, etc, if a bathroom or meal break is taken during the transport. As the Supreme Court stated in ***Bell***,

> Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

It is clear that even if this Court were to only consider the ***Bell*** test, the Defendants' former practice of strip searching those inmates who were transferred from another detention facility is reasonable and the justification clearly outweighs any invasion of rights that may occur as a result of the search. As such, the transferred inmates' Fourth Amendment rights were not violated by this practice and/or policy and the Defendants are clearly entitled to partial summary judgment as a matter of law on this issue.

If however, this Court disagrees with Defendants' arguments and determines that the policy was violative of the inmates' rights, this Court must nevertheless uphold it if it

is "reasonably related to legitimate penological interests." ***Turner***, 482 U.S. at 89.

This rational relationship test requires this Court to consider the following factors: (1) whether there is a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are alternative means for inmates to exercise their constitutional rights; (3) the impact that accommodation of these constitutional rights may have on other guards and inmates, and on the allocation of prison resources; and (4) the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

First, Defendants have previously explained that their justification for strip searches under this scenario is rationally connected to the policy. Strip searches following transfer from other detention facilities (where contraband may have been readily available and where, during the transfer, inmates were exposed to areas where the public may have access) will prohibit and/or deter contraband from being brought into the Jail. Furthermore, the alternative proposed by Plaintiffs is not reasonable.

Plaintiffs argue that Defendants should be required to conduct some sort of investigation upon receiving each new transfer before determining whether a strip search should be conducted. In this "utopia", the booking officer would need to interview the transporting officer to determine if the inmate was transported through a jail lobby, parking lot, or other area exposed to the public before he was placed in his/her vehicle. Of course, this practice would be as full-proof as the transporting officer's memory. As to the actual transport, the booking officer would also have to ask: (1) whether the transporting officer thoroughly searched his vehicle after his last transport of an inmate/arrestee; (2) whether the inmate was allowed to sit in the front or back seat; (3)

whether the inmate was allowed to smoke cigarettes during the transport and/or had them in his possession when he took him into custody; (4) whether the inmate was handcuffed the entire time during the transport; (5) whether any stops were made during the transport; (6) where the inmate's personal belongings were kept during the transport; (7) whether his personal belongings (upon taking him into custody) contained any items of contraband, e.g., cigarettes, prescription drugs, knives, etc. Again, this process would have to rely strictly on the transporting officer's memory.

In addition, the booking officer would have to call the transferring facility and determine if, during his incarceration, the inmate (1) had any contact visits; (2) had any court appearances; (3) worked outside the facility; (4) had been taken for any medical treatment outside of the facility; (5) had any violent or drug charges pending against him in that county; (6) had been given any furloughs; (7) had reported to the jail via a controlled intake procedure; (8) had been strip searched at anytime during his incarceration; (9) had been intermingled with any violent or drug offenders.[3]

The person who answers the phone at the jail is not going to have this information. This type of information would have to be gathered from various sources such as the medical staff, the Class D program director, administrative staff, etc. This procedure would be extremely cumbersome, not necessarily reliable, a long process that could take hours or even days, and is therefore not a reasonable "ready alternative."

Furthermore, recall that the Supreme Court stated that

> This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate

[3] Recall Teague fits into several of these categories. He was charged with possession of marijuana by Christian County, had been to court, was likely held with other drug offenders, and had not been strip searched at anytime during his incarceration at the Christian County Jail.

> can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 90-91. This alternative is not reasonable and would not be at "de mimimis cost". This would require the Jail to hire more deputies, as more time is needed to book an inmate. It would also require the Jail to hold the inmate in an area that has no access to other inmates, etc. until all of the information is gathered (hours or even days). And it would require the staff to be more sensitive to any safety concerns that may exist while this investigation is conducted.

Both ***Bell*** and ***Turner*** caution that "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . . [C]ourts should ordinarily defer to their expert judgment in such matters." ***Bell***, 441 U.S. at 547-48. And "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" ***Turner***, 482 U.S. at 89-90 (internal quotations omitted).

Furthermore, recall that two Eastern District of Kentucky courts have held that inmates who are taken to court and/or are on work detail can be strip searched upon their return to the facility. *See* ***Richerson*** and ***Black***, *supra*. There is absolutely no legitimate reason to differentiate between inmates who are transported to court by a transporting officer and/or on supervised work detail (and therefore likely to have accessed areas to which the public has access) and those inmates who are transported from one correctional facility to another (and also likely have accessed areas to which the public has access).

In fact, persons who have been transferred from another facility may be more of a

security risk than those who were merely transported to court or on work detail. At least in the latter, the detention facility is aware of its own security practices, knows whether the person has been previously strip searched, and exercises control over the deputy jailers who supervise them in court and on work detail. In the case of a transferred inmate, the detention facility knows absolutely nothing about the security practices of the other facility, nor whether the inmate has been previously strip searched (and even if so, how thorough that procedure is), and has absolutely no control over the transporting officer who supervised the inmate during the transport.

In light of the deference that must be accorded to a detention facility's rules and regulations, it is clear that this Court must rule that Defendants' practice of strip-searching inmates following a transfer from another detention facility is a reasonable response to a legitimate penological interest and/or concern. Defendants therefore are entitled to partial summary judgment on this issue, as a matter of law.

D. Those cases cited by Plaintiffs for the proposition that a strip search following a transfer from another facility are not relevant and highly distinguishable.

The Plaintiffs have cited five cases which they claim support their argument that inmates cannot be strip searched "following a transfer from another facility." First, it should be noted that four of the five cases are from the Second Circuit, which apparently takes a very conservative view of a jail's right to strip search as that circuit does not even recognize the right to strip search inmates following medical treatment or a court appearance. *See* ***Shain v. Ellison***, 273 F.3d 56 (2nd Cir. 2001) (Plaintiff who was arrested, failed to turn over a pocket knife to the police, placed in a holding room at the police station, subsequently taken to the hospital where he was treated, and then

thereafter taken to a court appearance was improperly strip searched upon his arrival at the jail). The other three Second Circuit cases cited by Plaintiffs are ***Lee v. Perez***, 175 F.Supp.2d 673 (S.D. N.Y. 2001); ***N.G. and S.G. v. Connecticut***, 382 F.3d 225 (2nd Cir. 2004); and ***Dodge v. County of Orange***, 282 F.Supp.2d 41 (S.D.N.Y. 2003). All three of these cases cite ***Shain v. Ellison*** to support their holdings.

Interestingly, in ***Shain***, despite the dissent's argument otherwise, the Second Circuit refused to apply the ***Turner*** four factor "reasonably related to legitimate penological objectives" standard. 273 F.3d 65-6, 70. The majority believed that the ***Turner*** opinion only applied to prisons, not jails. Had the majority applied the test, however, they would have ruled that strip searching an inmate after he refused to hand over a pocket knife, was treated at the local hospital, and had a court appearance was rationally related to a legitimate penological objective.

In contrast, the Sixth Circuit has applied the ***Turner*** four factor "reasonably related to legitimate penological objectives" test to suits brought by pre-trial detainees challenging *jail* regulations. *See e.g.,* ***Martucci v. Johnson***, 944 F.2d 291 (6th Cir. 1991) and ***Ward v. Washtenaw Co. Sheriff's Dept.***, 881 F.2d 325 (6th Cir. 1989). In addition, several sister courts within this Circuit have applied that test to cases in which pre-trial detainees challenged a jails' strip search policies. *See e.g.,* ***Rose v. Saginaw County***, 353 F.Supp.2d 900 (E.D. Mich., 2005); ***Johnson v. City of Kalmazoo***, 124 F.Supp.2d 1099 (W.D. Mich., 2000).

As a result, because the Second Circuit cases do not apply the same test as the Sixth Circuit, they should not be considered by this Court. Regardless, as will be discussed below, those cases cited by Plaintiffs, are highly distinguishable because *four*

of the five of them did not involve a transfer from another correctional facility.

Shain v. Ellison involved a man arrested by the Nassau County Sheriff's Department, taken to the hospital and then a court appearance before he was *initially* incarcerated. 273 F.3d 56 (2nd Cir. 2001). The Court held that the policy of strip searching "each newly admitted inmate", regardless of the criminal charges or whether there is reasonable suspicion to believe that the inmate has contraband is unconstitutional. This holding is clearly distinguishable from the facts in this case as the inmate was not a transfer from another correctional facility. Furthermore, it clearly contradicts the holding of several courts in the Sixth Circuit.

Lee v. Perez (a Second Circuit case) similarly involved a man who was arrested, taken to the police department to be booked and then taken to court for arraignment before his *initial* incarceration. 175 F.Supp.2d 673 (S.D.N.Y. 2001). Accordingly, this case is likewise distinguishable because the arrestee was not a transfer from another correctional facility, as Plaintiffs' suggest.

N.G. and S.G. v. Connecticut (Second Circuit) involved two runaway juveniles *who were not charged with any crimes*. 382 F.3d 225 (2nd Cir. 2004). They were strip searched pursuant to Connecticut's blanket strip search policy for all those admitted to juvenile detention centers. The Second Circuit concluded that the searches conducted upon each initial entry into the custody of the State's juvenile authorities were lawful, but that "repetitive searches conducted while the girls remained in custody" upon transfer to other juvenile detention centers operated by the State of Connecticut was a violation of the Fourth Amendment.

This case is clearly distinguishable because there is no evidence that the inmates

who are received at Hopkins County have already been strip searched by anyone at the previous detention facility and are therefore subjected to "repetitive searches." Furthermore, in ***N.G. and S.G.***, the State of Connecticut owned all of the juvenile detention centers and therefore knew whether the juvenile had previously been strip searched. In addition, Connecticut transported the juveniles. In this case, Hopkins County has no way of knowing whether an inmate was strip searched at the former detention facility, and if they were, to what extent. Nor does Hopkins County have custody of the inmate during the transport.

This case is further distinguished by the fact that the persons strip searched in ***N.G. and S.G.*** were juveniles who were not charged with any crimes. One can certainly understand the Court's reluctance to allow repetitive strip searches of juveniles who are not charged with a crime. In contrast, in this case, the inmates are adults who are charged with crimes. Clearly, for many reasons, this case is distinguishable.

Dodge v. County of Orange (another Second Circuit case) involved inmates who challenged the County's strip search policy, which dictated that all *newly* arrested and/or arraigned inmates be strip searched upon their initial arrival at the jail, without regard to the nature of the charges against the inmate. 282 F.Supp.2d 41, 49 (S.D.N.Y. 2003). There is absolutely no indication in the opinion that the plaintiffs in that case were incarcerated in another detention facility prior to their incarceration in Orange County. As such, this case is likewise easily distinguishable.

Finally, the only alleged "transfer case" cited by the Plaintiffs that is not from the Second Circuit is ***Ford v. City of Boston,*** 154 F.Supp.2d 131 (D. Mass. 2001). However, that case also did not involve an inmate who was transferred from another detention

facility. In ***Ford***, the plaintiffs were "female prisoners arrested or detained by members of the Boston Police Department [who] were processed in the usual manner and then transported to the Suffolk County Jail for . . . detainment." ***Id.*** at 135. Again, this case is distinguishable, as it does not involve the opportunities for exposure to areas where contraband can be found as in cases when a person is arrested, taken to a detention facility outside of Hopkins County where they can remain for several hours, days, weeks, or months, wherein they can be "exposed to areas to which the public has access" and then transported to Hopkins County by a transporting officer, where again they can be "exposed to areas to which the public has access."

Plaintiffs' have not cited one single relevant case that supports their argument that the Defendants' former procedure of strip searching inmates following a transfer from another detention facility is unconstitutional. Defendants also have not found any cases in which a court has ruled that a practice of strip searching inmates following a transfer from another county detention facility is unconstitutional. This case is one of first impression. Plaintiffs are asking this Court to be the first Court to determine that a practice utilized by numerous jails and prisons across the United States is unconstitutional, citing only Second Circuit distinguishable authority for their arguments. However, undoubtedly, the ***Bell***, ***Richerson, Black*** line of reasoning clearly dictates a finding of constitutionality in this case.

E. The Defendants' strip search records which indicate a low occurrence of positive results following transport is merely a "testament to the effectiveness" of the search policy.

Plaintiffs attempt to argue that Defendants do not have reasonable suspicion to strip search inmates who are transferred from another detention facility because the strip

search reports for the last three years indicate positive results in only six instances. However, in ***Bell v. Wolfish,*** the Supreme Court was unimpressed with a similar argument made by the Plaintiffs. They determined that the fact that only one inmate had been "discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to a lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." 441 U.S. 520, 559 (1979).

Furthermore, in ***Richerson***, citing ***Bell***, Judge Forester likewise categorically rejected a similar argument. 958 F.Supp. 299 (E.D. Ky. 1996). In considering this argument, the Court stated as follows:

> It is clear that a detention center has a legitimate interest in preventing the flow of contraband into the facility. As previously pointed out, the Supreme Court in *Bell v. Wolfish* noted that the smuggling of contraband is 'all too common an occurrence.' *Bell v. Wolfish*, 441 U.S at 559. While the plaintiff argues that the actual number of times contraband is found in the detention center is relatively insignificant, the Court is unprepared to discount the seriousness of any occurrence of contraband in a detention center. The Court is also mindful of the Supreme Court's suggestion that the lack of contraband 'may be more testament to the effectiveness' of a search policy 'as a deterrent than to any lack of interest on the part of the inmates' to smuggle contraband when given the opportunity. *Id. Thus, the Court is unimpressed by an argument based on the perceived lack of documented incidents involving contraband found within the detention center.*

Id. at 306.

Inmates being transferred to Hopkins County are likely aware that they may be subjected to a strip search upon their arrival at the Hopkins County Jail. As such, this Court must conclude, as the Supreme Court did, that the low occurrence of positive results is merely a "testament to the effectiveness" of the strip search policy "as a deterrent than to any lack of interest on the part of the inmates" to smuggle contraband

into the Jail.

Furthermore, it only takes one person to smuggle dangerous contraband into the Jail to cause serious problems, such as injuries, escapes, and/or death. A lax procedure in this regard could result in the Jail's liability for damages as a result of only one incident when contraband was not found. Plaintiffs appear to attempt to minimize the results of the strip search procedures because in five of the six cases, "the *only* contraband found was cigarettes or tobacco-related items." (Motion for Partial Summary Judgment, p. 23, emphasis added). However, as former Jailer James Lantrip stated in his affidavit, cigarettes are contraband in the Hopkins County Jail. Persons who are able to smuggle cigarettes into the facility are commonly faced with threats of violence from other inmates who are desperate for a cigarette. In addition, cigarettes are used as a form of barter for trading prescription medications, food, and for gambling. (*See* Lantrip Affidavit, attached hereto as Exhibit "F"). Therefore, in this type of setting, cigarettes can be as lethal and/or dangerous as a weapon, drugs, etc. Until Plaintiffs and/or their counsel have been in a position to supervise inmates, many of whom are dangerous, it is inappropriate to pass judgment on what type of contraband should cause concern.

F. Even if this Court determines that the Jail's former procedure is unconstitutional, Plaintiffs and/or the class members are not entitled to partial summary judgment because this Court must undertake an independent analysis to determine if each of them would have been otherwise subject to a lawful strip search.

Even if this Court determines that the Jail's former procedure of strip searching inmates upon arrival following a transfer from another detention facility is unconstitutional, Plaintiffs and/or class members are not automatically entitled to a finding that they were "subjected to an illegal search", as Plaintiffs request. Teague's

deposition testimony is illustrative. Just the day before he was transferred to Hopkins County, he had been charged with possession of marijuana and drug paraphernalia. He had not been strip searched upon entry into the Christian County Jail. He went to court, where he pled guilty to the charges and again was not strip searched following his court appearance. The fact that Teague, on the day of transfer, had been convicted of possession of marijuana and drug paraphernalia, in and of itself would make him eligible for a lawful strip search. *See* 501 KAR 3:120(3)(b).

Likewise, Ladonia Nelson, who was strip searched following a transfer from the Caldwell County Jail testified that she was previously convicted of possession of methamphetamine. Clearly, she would have been subjected to a lawful strip search. 501 KAR 3:120(3)(b). Regardless, without considering each inmate file, criminal record, etc., it is impossible to determine if each Plaintiff/class member was subjected to a lawful strip search. As such, even if this Court determines that the strip search policy at issue is unconstitutional, Plaintiffs' Motion to the extent that it requests a ruling that those Plaintiffs/class members who were subjected to a strip search following a transfer are entitled to a ruling that their search was illegal in violation of their constitutional rights must be denied pending a review of each inmate's criminal record, jail records, etc.

G. Plaintiffs are not entitled to preliminary injunctive relief.

Plaintiffs request this Court to issue a preliminary injunction, ordering the Defendants to discontinue enforcement of their procedure of strip searching all arrestees transferred from other detention facilities. They cite the correct test which is that the Court must consider (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the

injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. ***Déjà vu of Nashville, Inc. v. Metro Gov't of Nashville***, 274 F.3d 377, 400 (6th Cir. 2001).

However, Plaintiffs cannot meet this test and are therefore not entitled to a preliminary injunction. First, as Defendants have made clear in this Response and Motion, Plaintiffs are not likely to succeed on the merits.

Second, the Plaintiffs will not suffer irreparable harm if the injunction is not issued. Defendants have repealed the previous procedure and replaced it with a procedure that only allows a strip search of a transferring inmate if his criminal charges or some other factor invokes reasonable suspicion. (*See* Exhibit "A"). In ***Brandywine, Inc. v. City of Richmond, Ky***, an adult bookstore challenged a city's zoning ordinance seeking injunctive and monetary relief. 359 F.3d 830 (6th Cir. 2004). During the pendency of the action, the city amended the offending ordinance such that it no longer prohibited Brandywine, Inc. from operating in the zone where it was located. The Sixth Circuit held that the mootness doctrine precluded the Court from issuing an injunction when the ordinance was no longer in effect. ***Id.*** at 836. "We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." ***Id.*** As a result, Plaintiffs' motion for preliminary injunctive relief must be denied as the Plaintiffs are not likely to succeed on the merits, and regardless of that, they will not suffer irreparable harm if the injunction is not issued since the procedure is no longer in effect.

IV. CONCLUSION

For the foregoing reasons, Defendants hereby respectfully request that Plaintiffs'

Motion for Summary Judgment and for Preliminary Injunction be denied and that Defendants' Cross-Motion for Summary Judgment be granted. This Court is barred from determining that a former procedure is unconstitutional. However, Defendants request that this Court determine that the past procedure of strip searching those inmates following a transfer from another detention facility was in fact constitutional and therefore dismiss all such claims by the Plaintiffs/class members.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 31st, 2006, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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