IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JENNIFER REYNOLDS, ASHLEY McCORMICK, HERBERT CARTER, and DEVON SHEPARD, both individually and on behalf of a class of others similarly situated,	:	**NO. 1:07-CV-01688-CCC**
	:	**(Complaint filed 9/16/07)**
Plaintiffs	:	**Judge Thomas I. Vanaskie**
v.	:	**CIVIL ACTION – LAW**
THE COUNTY OF DAUPHIN, Defendant	:	**JURY TRIAL DEMANDED**

DEFENDANT COUNTY OF DAUPHIN'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

LAVERY, FAHERTY, YOUNG & PATTERSON, P.C.
Frank J. Lavery, Jr.
Pa. Bar I.D. No. 42370
Robert G. Hanna
Pa. Bar I.D. No. 17890
Devon M. Jacob
Pa. Bar I.D. No. 89182
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245
(717) 233-6633 (telephone)
(717) 233-7003 (facsimile)

Co-counsel for Defendant

McNEES WALLACE & NURICK LLC
David E. Lehman
Pa. Bar I.D. No. 15243
James P. DeAngelo
Pa. Bar I.D. No. 62377
Carol Steinour Young
Pa. Bar I.D. No. 55969
Devin J. Chwastyk
Pa. Bar I.D. No. 91852
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
(717) 232-8000 (telephone)
(717) 237-5300 (facsimile)

Co-counsel for Defendant

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases: Page

Cases: (cont'd) Page

Statutes:

I. ARGUMENT

A. Plaintiffs Attempt To Introduce Facts That May Not Be Considered By The Court When Ruling On Defendant's Motion To Dismiss.

Plaintiffs attach documents to their Brief In Opposition to Defendant's Motion to Dismiss that the Court should not consider when ruling on Defendant's Motion to Dismiss. Plaintiffs rely upon these documents to support their arguments throughout their Brief. (See, Doc. 45, pp. 1-3, 7, 10). As Plaintiffs aptly point out in their introduction, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. (Doc. 45, p. 1); Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197, 2200, 167 L. Ed.2d 1081 (2007). The court may only consider certain narrowly defined types of material without converting the motion to dismiss to a summary judgment motion, including a document that is integral to or explicitly relied upon in the complaint. In re Rockefeller Center Properties, Inc. Securities Litig., 184 F.3d 280, 287 (3d Cir. 1999). A court may also consider an "undisputedly authentic document that *a defendant* attaches as an exhibit to a motion to dismiss if the plaintiff's

claims are based on the document." P ension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993) (*emphasis* added).

Plaintiffs have attached several ex trinsic documents to their brief in opposition to Defendant's Motion to Dismiss, including a document captioned as a "post order" which purported ly describes job responsibi lities of a booking officer at the Prison, (Doc . 45, Exhibit "B"), and excerpts of the deposition transcript of Dauphin County Prison Warden Dominick DeRose. (Doc. 45, Exhibit "A"). These extrin sic documents are neither integral to nor expressly relied upon in the Complain t, and Defendant did not introduce them at this stage. Plaintiffs cannot present the Court with the "post order" or DeRose's deposition transcript to support their arguments in opposition to Defendant's Motion to Dismiss because such documents are not integral to or explicitly relied upon in the Amended Complaint. In re Rockefeller Center Properties, Inc. Securities Litig., supra.

Even if such documents were int egral or relied upon in the Amended Complaint, only Defendant may introdu ce documents in support of its argument. Pension Benefit Guar. Corp., supra. Thus, Defendant urges this Court to ignore the documents attached to Plaintiffs' Brief in Oppositi on and their arguments arising there from when ruling on D efendant's Motion to Dismiss.

B. Plaintiffs' Proposed Class Is Facially Overbroad Because It Contains Putative Members Whom, As A Matter Of Law, Defendant Had Reasonable Suspicion To Strip Search, And The Court Should Therefore Dismiss Those Putative Members By Limiting Plaintiffs' Class Definition In Accord With Established Law.

As set forth in Defendant's initial brief in support of its Motion to Dismiss, Plaintiffs have drawn their proposed class so broadly that it encompasses arrestees whom Defendant could constitutionally strip search based entirely on the nature of their offense or their past criminal history. See Defendant's Brief In Support Of Its Motion To Dismiss The Amended Complaint ("Defendant's Brief") at § IV(A).

Courts of Appeal in the 1st and 11th Circuits, and a District Court in the 4th Circuit, have held that jail administrators may strip search, without any further individualized suspicion, an arrestee who has been detained for a crime involving weapons or contraband, or who has a prior record of convictions or unresolved arrests for felonies, or for misdemeanors involving weapons or contraband. See Powell v. Barrett, 496 F.3d 1288, 1310 (11th Cir. 2007); Tardiff v. Knox County, 365 F.3d 1, 5 (1st Cir. 2004); Smith v. Montgomery County, 643 F. Supp. 435, 439 (D.Md. 1986). Defendant has requested that this Court reach a similar conclusion, and hold that, as a matter of law, Plaintiff's proposed class is overly broad because it includes putative class members who fall within these categories.

1. Defendant Has Not Conceded That Blanket Strip Search Policies Are Unconstitutional.

No court has issued any judicial opinion, controlling upon this Court, holding that individualized reasonable suspicion is required to strip search a pretrial detainee. The United States Supreme Court, in its only decision on the question, refused to even find that pretrial detainees retain any Fourth Amendment rights upon their commitment to a detention facility. See Bell v. Wolfish, 441 U.S. 520, 560 (1979).

Legal precedent interpreting the Supreme Court's decision in Wolfish is inconsistent, and several courts have held that no reasonable suspicion is required to justify the strip search of a pretrial detainee. See Defendant's Brief at pp. 7-10 (noting that neither the Supreme Court nor the Third Circuit has held that individualized reasonable suspicion is required to strip search a pretrial detainee, and setting forth six federal circuit decisions critical of that prevailing interpretation of Bell v. Wolfish). Most recently, the Virginia Court of Appeals held that a visual cavity search (strip search) of a pretrial detainee need not be justified by reasonable suspicion to pass scrutiny under the Fourth Amendment. See Winston v. Comm., 654 S.E.2d 340, 2007 WL 4523089 (Va. App. Dec. 27, 2007) (citing Wolfish, 441 U.S. at 559).

Given this lack of uniformity, Plaintiffs' statement that "The County acknowledges that blanket strip search policies/practices are unconstitutional," Plaintiffs' Brief at p. 4, is a mischaracterization. See Defendant's Brief at 6 (recognizing that the prevailing interpretation of Wolfish requires reasonable suspicion to justify a strip search of a detainee, but citing dissenting opinions). To the contrary, the County will contend that the prevailing interpretation of Wolfish is incorrect, and that reasonable suspicion is not required to strip search a pretrial detainee. The Court's consideration of Defendant's Motion to Dismiss, however, does not require any examination or resolution of these competing viewpoints.

2. Defendant Urges This Court Find, as A Matter of Law, That No Reasonable Suspicion is Required to Strip Search an Arrestee Who Has Been Detained for A Crime Involving Weapons, Violence or Contraband, or Who Has A Prior Record of Convictions or Unresolved Arrests for Felonies, or for Crimes Involving Weapons, Violence or Contraband.

a. The nature of an arrestee's offense, or their prior criminal record, properly establishes reasonable suspicion and objectively justifies any strip search of the arrestee.

Defendant was not required to have reasonable suspicion to strip search any arrestee detained for a crime involving weapons, violence or contraband, or who has a prior record of convictions or unresolved arrests

for felonies, or for crimes involving weapons, violence or contraband, because the nature of such charges or prior criminal history alone provides reasonable suspicion constitutionally justifying a visual body cavity search. See Defendant's Brief at pp. 8-9 (citing Powell v. Barrett, 496 F.3d 1288, 1310 (11th Cir. 2007); Tardiff v. Knox County, 365 F.3d 1, 5 (1st Cir. 2004); Smith v. Montgomery County, 643 F. Supp. 435, 439 (D.Md. 1986)). See also Hicks v. Moore, 422 F.3d 1246, 1252 (11th Cir. 2005); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989). Because these detainees have no potential claims for a violation of their Fourth Amendment rights, this Court may limit the size of the proposed class as a matter of law based upon the nature of the charges and/or prior criminal history of the pre-trial detainee.

In Powell v. Barrett, 496 F.3d 1288 (11th Cir. 2007), plaintiffs challenged the constitutionality of a county jail's strip search policy, similar to that presented by Plaintiffs in this matter. In the Court's discussion regarding whether reasonable suspicion existed to search certain class members, the Court recognized that a person charged with a crime of violence is sufficient to evoke reasonable suspicion that the person may be concealing weapons or contraband. Powell, 496 F.3d at 1311. The Court opined that "where a person is arrested for an offense involving weapons or

drugs – such as possessi on or use of a firearm and possession, use, or distribution of an illegal substance – it is objectively reasonable to conduct a strip search of that person before he comes into contact with other detainees." Id. The Court concluded that the nature of a charge itself, independent of the facts surrounding the arrest, gi ves rise to reasonable suspicion. Id.

Defendant urges that the Court adopt the holding of Powell, and the other cases cited above, that a jail er need not have reasonable suspicion to strip search a pretrial detainee arres ted for a crime involving weapons, violence or contraband, or who has a prior record of convictions or unresolved arrests for felonies, or for crimes involving weapons, violence or contraband, because such arrest or crim inal history, as a matter of law, provides reasonable suspicion. Consistent with those cases, Defendant has offered an alternate class definition that does not include detainees charged with the types of offenses or with the criminal history outlined in Powell. See Defendant's Brief at p. 11.

b. Defendant can establish reasonable suspicion for the strip search of pretrial detainees based upon an objective review of the circumstances, rather than a subjective review of the reasons that searches were conducted.

Contrary to Plaintiffs' exhortations, it is irrelevant whether Defendant's actual justifications for the strip search of putative class members arose from the nature of their charges or their prior criminal history. Rather, the Court should examine "whether, given the circumstances, reasonable suspicion *objectively* existed to justify the search." Powell, 496 F.3d at 1310 (emphasis in original). The distinction between a government actor's subjective motivations and the objective criteria arising from the circumstances is a well-recognized tenet of American constitutional law.

The United States Supreme Court has made clear, time and time again, that an examination of the constitutional reasonableness of a government search rests on an objective, after-the-fact analysis of the circumstances, rather than a subjective review of the actual basis for the action. This principle has been especially well enunciated in cases examining the reasonable required to justify governmental searches.

In Terry v. Ohio, 392 U.S. 1, 21-22 (1968), the Supreme Court emphasized the objective aspect of the term “reasonable” in its examination of the constitutionality of pat-down searches by police officers:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard; would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Since Terry, the Court has made clear that the "objective" justifications for a search that may later become apparent need not conform to the "subjective" justifications that were apparent at the time:

> We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action . . . The Courts of Appeals which have considered the matter have likewise generally followed these principles, first examining the challenged searches under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved.

Scott v. U.S., 436 U.S. 128, 138 (1978). See also Whren v. U.S., 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); U.S. v. Leal, 235 Fed. Appx. 937, 2007 WL 1655658 (3d Cir. 2007) ("Law enforcement officers have broad leeway to conduct searches and seizures regardless of whether their subjective intent corresponds to the legal justifications for their actions if the legal justification is objectively grounded."); U.S. v. Jones, 657 F. Supp. 492,

497 (W.D.Pa. 1987) ("We look at the obje ctive facts, not at the officers' subjective intent: even if the police o fficers' professed reason for the search is incredible or i nsufficient, the search wi ll be legal if the objecti ve circumstances known to the officers would have justified a reasonable officer in taking these actions.") (citing United States v. Hawkins, 811 F.2d 210, 215 (3d Cir.1987)).

These same objective criteria sh ould be appli ed when examining the reasonableness of a jailer's strip search of a pretrial detainee. See Powell v. Barrett, 496 F.3d 1288, 1310 (11th Ci r. 2007); Hicks v. Moore , 422 F.3d 1246, 1252 (11th Cir. 2005); Evans v. Stephens , 407 F.3d 1272, 1280 n. 9 (11th Cir. 2005). As stated by the court in Hicks:

> [T]he question we are faced with here is not whether a specifi c arresting officer or jailer act ually and subj ectively had the pertinent reasonable suspicion, but whether, given the circumstances, reasonable susp icion objectively existed to justify such a search. T hat no one, at the time, actual ly conducted a "reasonable suspici on" analysis is unimportant to whether reasonable suspicion obj ectively existed, given the circumstances. The subjective intentions and beliefs of the jailers conducting the strip search are immaterial to the Fourth Amendment analysis.

Hicks, 422 F.3d at 1252.

Plaintiffs ignore this well-established body of l aw, instead argui ng that Powell, and its applicati on of the "objective cri teria" standard to strip search cases, "has been ostensibl y ignored by the majority of Federal courts," and

that Defendant cannot rel y on "post hoc " demonstrations of reasonable suspicion as to some purported class memb ers. Plaintiff's Brief at p. 7-8. Plaintiffs, however, point to absolutely no case law that supports thei r contention that the law in the contex t of strip searches should depart from the uniform precedent of our Fourth Amendment jurisprudence to focus instead on the subjective justifications of corrections officers who stri p search pretrial detainees.

Plaintiffs contend that governmental consideration of the obj ective criteria of the charges and criminal history of an arrestee was rejected in Davis v. County of Camden , 657 F . Supp. 396, 400-401 (D.N.J. 1987). Davis, however, involved an individual plai ntiff's claim that she was illegally strip-searched. T here, the "defendant s candidly admit that the county officers had no reasonable suspi cion that the plaintiff was concealing weapons or contraband." Distinguishing the facts from Smith, supra, a class action where the court had held that an arrestee's charges or criminal history could justify a strip search, the Davis court noted:

> In Smith, a class action, defendants never conceded that they harbored no actual suspicion with respect to any plaintiffs; to the contrary, they persistently asserted that they had probabl e cause to search every person that had opted in to the cl ass. The Smith court . . . did *not* . . . hold that once a determination

> has been *made* that a particular arrestee does not present a danger, a search may proceed nonetheless.

Davis, 657 F. Supp. at 400. The Davis decision, therefore, rested on the specific fact that the jail administrators had admitted that they had no reasonable suspicion as to the individual plaintiff. To the extent that the Davis decision thereafter criticized what it called a "blanket risk approach" [1] justifying the strip search of class action plaintiffs based on their charges or criminal history, such holding is dicta, and further is contrary to Powell, Whren, and the other cases cited above.

Plaintiffs cite to two cases that held that a particular drug arrest did not create reasonable suspicion sufficient to justify a strip search of the arrestee. Plaintiffs' Brief at p. 9 (citing Way v. County of Ventura, 445 F.3d 1157, 1161-1162 (9th Cir. 2006) and Dodge v. County of Orange, 209 F.R.D. 65, 76-77 (S.D.N.Y. 2002)). These decisions are outliers, which run contrary to the consensus established above, and, further, both ignore the recognized interests of jail officials to prevent the smuggling of contraband into their prisons and the need for bright-line rules to allow effective enforcement of jail policies. See Wolfish, 441 U.S. at 559; Smith, 643 F. Supp. at 437.

---

[1] Contrary to Plaintiffs' assertions, courts have not uniformly criticized or invalidated the "blanket risk approach." To the contrary, Defendant's research has uncovered only two opinions that even reference this approach.

None of the other cases cited by Plaintiffs address whether an arrestee's charge or prior criminal history could provide constitutionally valid objective criteria to justify a strip search.

c. Defendant's strip searches of significant portions of the putative class were based upon objectively reasonable criteria, and therefore did not violate the Constitution.

Based upon the objective factors of the nature of the charge for a detainee and a detainee's prior criminal history, it can be concluded that reasonable suspicion existed to strip search many of the detainees included in Plaintiffs' putative class. Clearly, this is a purely legal determination, one that this Court may make at this time as a matter of law based upon the class definition as alleged in Plaintiffs' Amended Complaint. Plaintiffs' proposed class definition includes persons as to whom reasonable suspicion existed, arising by the very nature of the crime the person was charged or their past criminal history, i.e. those detainees whose charges upon intake implicated either weapons or drugs, or who had a past conviction for a felony, drug or weapons charge. Because Plaintiffs' proposed class includes these detainees, it is overbroad as a matter of law.

Moreover, although Plaintiffs allege that the County has a policy of strip-searching all pre-trial detainees, such allegation, even if proven to be true, does not necessarily result in a violation of each class member's

constitutional rights. The mere fact that a detainee undergoes a strip search at a jail that had a blanket strip search policy does not mean that every search conducted actually violated the Constitution. See, e.g., Hicks v. Moore, 422 F.3d 1246, 1251 (11th Cir. 2005). Therefore, even assuming that the averments in Plaintiffs' Amended Complaint are true, such a policy would not necessarily result in violations of the constitutional rights of all persons strip searched. Rather, if reasonable suspicion objectively existed that the pre-trial detainee is concealing contraband, that detainee cannot establish that the strip search was a violation of his/her constitutional rights. Thus, the Court may objectively determine at this stage of the proceedings that Dauphin County had reasonable suspicion to search certain pre-trial detainees, as outlined above, and that such a determination may be based upon the nature of the detainee's charges and/or prior criminal history.

3. Discovery is Not Necessary to Determine That Plaintiffs' Putative Class is Overbroad as A Matter of Law.

Plaintiffs contend that discovery must be completed before any determination regarding class size is made. Plaintiffs are mistaken. The determination that the Plaintiffs' proposed class is overbroad as presently defined is a matter of law. For example, there are no facts which could be discovered which would result in a finding that a searching officer lacked

reasonable suspicion to search a pre-trial detainee who was arrested on a drug charge. Thus, no discovery is necessary to determine whether Plaintiffs' putative class should be substituted with Defendant's proposed definition of class members.

Indeed, Plaintiffs have not denied or refuted the fact that many of the putative members of their proposed class, as presently drawn, are arrestees who have been detained for a crime involving weapons or contraband, or who have a prior record of convictions or unresolved arrests for felonies or for misdemeanors involving weapons or contraband. As to these individuals, Defendant, as a matter of law, possessed objective criteria creating reasonable suspicion sufficient to justify their strip search upon admission to Dauphin County Prison. No further discovery is required to establish that Plaintiffs' proposed class is too broadly drawn, and that these individuals have no actionable claims against Defendant.

Plaintiffs, in fact, suggest that they may later voluntarily agree to narrow their class to the limits proposed by Defendant: "Plaintiffs may even consent…that certain categories should be excluded from the class definition." (Doc. 45, p. 10). Plaintiffs nonetheless contend that further discovery should be taken as to putative class members with no legally cognizable claims (as outlined above and in Powell). Allowing such further

discovery only would result in needless expense to the parties and a waste of judicial resources.

Defendant therefore requests that Plaintiffs' Complaint be dismissed to the extent that its proposed class definition encompasses putative members without legally cognizable claims, and that Plaintiffs' proposed class definition be accordingly amended as set forth in Defendant's initial brief. See Defendant's Brief at p. 11.

4. Plaintiffs Have the Burden to Prove That Their Constitutional Rights Were Violated.

Plaintiffs contend that Defendant is not entitled to dismissal based on the existence of reasonable suspicion as to putative members of the overly broad class because the existence of reasonable suspicion is an affirmative defense, as to which the burden of proof is on Defendant. Plaintiffs' Brief at p. 7-8.

Plaintiffs' contention is incorrect because the determination of reasonable suspicion should be made as a matter of law, with respect to the detainees described above. Moreover, it is important to note that a plaintiff in a Section 1983 action has the burden to prove a violation of a civil right secured by the Constitution or federal law and must show that the alleged deprivation was committed by a person acting under color of state law. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). This

standard has been applied to various constituti onal claims brought pursuant to Section 1983 i n this jurisdiction. See Edwards v. Philadel phia, 860 F.2d 568 (3d Cir. 1988) (pl aintiff has the burden where the alleged deprivation i s the use of excessive force); Hill v. Borough of Kutztown , 455 F.3d 225, 241 (3d Cir. 2006) (plaintiff has the burden in a First Amendment retaliation claim brought pursuant to Section 1983). The burd en, therefore, is on Plaintiffs to establish that Defendant's al leged searches of the putative class members were in violation of the Fourth Amendment.

In support of their argument in opposition, Plaintiffs fi rst cite to two cases from other jurisdi ctions, Curry v. City of Syracuse , 316 F.3d 324 (2d Cir. 2003) and Mack v. Suffolk County , 191 F.R.D. 16 (D. Mass. 2000), which they construe as placing the burden to establish reasonable suspicion on Defendant. These cases do not stand for such a proposi tion in the context of a consti tutional challenge to a strip search policy pursuant to 42 U.S.C. § 1983. Additionally, no deci sions from the Third Ci rcuit or any district court in the Third Circuit following the reasoning of Curry or Mack.

In Curry, the plaintiff brought a claim against a police officer for false imprisonment. In its discussion regarding the elements of such a claim, the Court noted that a "defendant has t he burden of raisi ng and proving the affirmative defense of probable cause." Curry , 316 F.3d at 335. The false

imprisonment claim was brought pursuant to New York state law and it was not a claim for a United States constitutional violation. There was no discussion regarding the burden of a Plaintiff in a civil rights action brought pursuant to 42 U.S.C. § 1983, nor was there any mention of the burden in an action involving a constitutional challenge to a strip search policy. Furthermore, in this jurisdiction, courts have held that to prevail on a false arrest claim under Section 1983, a plaintiff must demonstrate at trial that the police lacked probable cause. Groman, 47 F.3d at 634.

In Mack, the plaintiffs brought a class action challenging the strip search policy of the Suffolk County Jail. After its determination that class certification was appropriate and after a finding that the women plaintiffs were routinely strip-searched, the Court stated that the burden then rested on the defendants to demonstrate that the particular searches were reasonable. No such determinations have been made here to shift the burden onto Defendant to prove that reasonable suspicion existed to strip search any individuals searched under any alleged strip search policy. Thus, Plaintiffs maintain the burden to prove that their constitutional rights were violated.

C. Plaintiffs' Amended Complaint Clearly Seeks Injunctive Relief And Named Plaintiffs Shepard, Carter, And Reynolds, And Putative Class Members, Do Not Have Standing To Seek Such Relief.

Plaintiffs contend that "[n]o request for [injunctive] relief is . . . presently pending" and it attempts to dissuade the Court from a "complicated standing question" at this juncture. (Doc. 45, p. 9). Plaintiffs' contention that they do not seek injunctive relief is untrue. At paragraph 4 of the prayer for relief portion of their Amended Complaint, Plaintiffs seek, "[a] preliminary and permanent injunction enjoining Defendant County of Dauphin from continuing to strip and visual cavity search individuals charged with misdemeanors or minor crimes absent particularized, reasonable suspicion that the arrestee subjected to the search is concealing weapons or contraband." (Doc. 24, p. 14).

Defendant requests that this Court dismiss the claim for injunctive relief filed on behalf of Plaintiffs Reynolds, Sheppard and Carter because the Amended Complaint is completely devoid of a claim that any of the three is likely to be subjected to a strip search again in Dauphin County. Glaringly, Plaintiffs' Amended Complaint does include an averment that "there is a possibility beyond mere speculation" that any of the plaintiffs other than Plaintiff McCormick will again be subjected to a strip search. (Doc. 24, ¶ 38). Without averring that Plaintiffs Shepard, Reynolds, and Carter, and

putative class members will be subjected to the complained of conduct in the future, i.e. a strip search at the Prison, those Plaintiffs do not have standing to seek injunctive relief. See City of Los Angeles v. Lyons, 461 U.S. 95, 75 L. Ed.2d 675, 103 S. Ct. 1660 (1983).

Plaintiffs further argue that named Plaintiffs and putative class members have standing to seek injunctive relief because the "situation presented to the Court is the quintessential example of one that is capable of repetition, yet avoiding review." (Doc. 45, p. 12). Perhaps not as concerned with any future relief of currently unrepresented parties, or their unwillingness to engage in such a "complicated" standing analysis, Plaintiffs briefly refer to case law from other jurisdictions which issued decisions contra to the decision issued by the United States Supreme Court in Lyons. Plaintiffs confuse the mootness doctrine in their discussion of standing and incorrectly apply the doctrine to their discussion of whether named Plaintiffs and putative class members have standing to seek injunctive relief.

Standing inquires whether "someone is the proper party to bring a lawsuit at the beginning of the case." Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1246 (3d Cir. 1996). "The three elements necessary to establish the irreducible constitutional minimum of standing are: (1) the plaintiff must have suffered an injury in fact - an invasion of a legally protected interest

which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Taliaferro v. Darby Twp. Zoning Bd., 458 F.3d 181, 188 (3d Cir. 2006) (citation omitted). Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness)." Rosetti v. Shalala, 12 F.3d 1216, 1224 n.19 (3d Cir. 1993) (citation omitted). "A central question in determining mootness is whether a change in the circumstances since the beginning of the litigation precludes any occasion for meaningful relief." Surrick v. Killion, 449 F.3d 520, 526 (3d Cir. 2006) (citation omitted).

Here, named Plaintiffs Shepard, Reynolds, and Carter, and putative class members, did not have standing to recover at the outset of this litigation. Thus, the mootness doctrine is inapplicable. Moreover, under the "capable of repetition" exception to the mootness doctrine as argued by Plaintiffs, a court may exercise its jurisdiction and consider the merits of a case that would otherwise be deemed moot when, "(1) the challenged action is, in its duration, too short to be fully litigated, and (2) there is a reasonable

expectation that the same complaining party will be subject to the same action again." Spencer v. Kemna, 523 U.S. 1, 17, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). Even assuming, *arguendo*, that the mootness doctrine applies as Plaintiffs contend (which Defendant contends is an incorrect analysis), the "capable of repetition" exception cannot provide recovery because the Amended Complaint failed to allege that Plaintiffs Shepard, Reynolds, and Carter, and putative class members, will be subject to strip searches at the Prison again. Defendant urges this Court to follow Lyons and conclude that named Plaintiffs Shepard, Reynolds, and Carter, and putative class members, cannot obtain injunctive relief based upon the averments of the Amended Complaint.

WHEREFORE, for the reasons se t forth hereinabove, Defendant, County of Dauphin, hereby requests that this Honorable grant its Motion to Dismiss and enter the proposed order.

Respectfully submitted,

Lavery, Faherty, Young & Patterson, P.C.

Date: January 23, 2008

By: /s/ Frank J. Lavery, Jr.

Frank J. Lavery, Jr.
Pa. Bar I.D. No. 42370
flavery@laverylaw.com

Robert G. Hanna
Pa. Bar I.D. No. 17890

Devon M. Jacob
Pa. Bar I.D. No. 89182
djacob@laverylaw.com
225 Market Street, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245
(717) 233-6633 (telephone)
(717) 233-7003 (facsimile)

Co-counsel for Defendant

McNEES, WALLACE & NURICK LLC

By: /s/ Carol Steinour Young

David E. Lehman
Pa. Bar I.D. No. 15243
dlehman@mwn.com
James P. DeAngelo
Pa. Bar I.D. No. 62377
jdeangelo@mwn.com
Carol Steinour Young
Pa. Bar I.D. No. 55969
csteinour@mwn.com
Devin J. Chwastyk
Pa. Bar I.D. No. 91852
dchwastyk@mwn.com

100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108
(717) 232-8000

Co-counsel for Defendant

CERTIFICATION OF COMPLIANCE
WITH WORD COUNT LIMIT

Pursuant to LR 7.8, the undersigned hereby certifies, subject to Red.R.Civ.P. 11, that this brief complies with the word-count limitations of LR 7.8(b)(2) because this brief contains 4,830 words.

By /s/ Carol Steinour Young
Carol Steinour Young
Co-Counsel for Defendant
County of Dauphin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2008, a true and correct copy of the foregoing **Defendant's Reply Brief in Support of its Motion to Dismiss Amended Complaint** was served via U.S. Middle District Court's Electronic Case Filing System upon the following:

Alan M. Ross, Esq.
amresquire@aol.com

Charles J. LaDuca, Esq.
charlesl@cuneolaw.com

Daniel C. Levin, Esq.
dlevin@lfsblaw.com

Elmer Robert Keach, III, Esq.
bobkeach@keachlawfirm.com

Gary E. Mason, Esq.
gmason@masonlawdc.com

Alexandra C. Warren, Esq.
awarren@cuneolaw.com

By /s/ Carol Steinour Young
Carol Steinour Young
Co-Counsel for Defendant
County of Dauphin

This document has also been electronic ally filed and is available for viewing and downloading from the ECF system.