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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARSIAL LOPEZ, individually, and as class representative,

Plaintiffs,

vs.

SHERIFF DONNY YOUNGBLOOD, individually and in his official capacity; FORMER SHERIFF MACK WIMBISH, in his individual capacity, COUNTY OF KERN, a governmental entity; KERN COUNTY SHERIFF'S DEPARTMENT, a California public entity; and DOES 1 through 100,

Defendants.
_____/

Case No. 07-0474 LJO DLB

DEFENDANTS JOINT MOTION FOR SUMMARY ADJUDICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION

Date: **August 29, 2008**
Time: **9:00 a.m.**
Ctrm: **9**

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TABLE OF AUTHORITIES

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Statutes

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Defendants SHERIFF DONNY YOUNGBLOOD, FORMER SHERIFF MACK WIMBISH, COUNTY OF KERN and its agency the KERN COUNTY SHERIFF'S OFFICE (incorrectly named as KERN COUNTY SHERIFF'S DEPARTMENT) hereby jointly move for summary adjudication and submit the following memorandum of points and authorities in support thereof.[1]

I.

INTRODUCTION

This is an action for class relief asserted by three Plaintiffs who claim that their constitutional rights have been violated as a result of the conditions of their confinement. Specifically, Plaintiffs allege, *inter alia*, that their rights under the Fourth and Fourteenth Amendments were violated when they were purportedly subjected to visual body cavity searches at the same time as other prisoners (hereinafter "group search") while in the custody of the Kern County Sheriff's Office ("KCSO"). The undisputed evidence in this case establishes that the searches of Plaintiffs were constitutionally sound and the fact that some may have occurred in small groups does not violate Plaintiffs' rights.

Plaintiffs' First Amended Complaint ("FAC") asserts various claims for relief against Defendants. In this motion, Defendants move for summary adjudication as to those claims asserted under the Fourth and Fourteenth Amendments and state law specific to group searches. Defendants base their motion on the clear and undisputed evidence establishing that Plaintiffs have not been deprived of any constitutional rights, as well as overwhelming legal precedent establishing that group

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[1]Defendants file this joint Motion for Summary Adjudication contemporaneous with their Opposition to Plaintiffs' Motion for Class Certification, pursuant to Eastern District Local Rule 78-230(e), which provides:

> Any counter-motion or other motion that a party may desire to make that is related to the general subject matter of the original motion shall be served and filed with the Clerk in the manner and on the date prescribed for the filing of opposition. In the event such counter-motion or other related motion is filed, the Court may continue the hearing on the original and all related motions so as to give all parties reasonable opportunity to serve and file oppositions and replies to all pending motions.

In this Motion, Defendants seek to eliminate one of the proposed classes that Plaintiffs seek to certify. Thus, this motion is related to the general subject matter of the original motion.

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searches are not *per se* in violation of the Constitution as Plaintiffs contend.

II.

STATEMENT OF FACTS

A. General Description of KCSO Jail Facilities

KCSO jails have about 2,500 beds between four different facilities. Defs. Undisputed Material Fact ("UMF") 1. These facilities include Central Receiving Facility (CRF), Ridgecrest, Mojave, and Lerdo. UMF 2. Lerdo is divided into four different divisions: pretrial, maximum-medium ("max-med"), female minimum and male minimum. UMF 3. The average total inmate population per day is 2,300. UMF 4. Generally the status of the inmate population house at the Lerdo facilities is, at a minimum, post-arraignment. UMF 65.

The main function of CRF is booking and receiving arrestees coming straight off the street. UMF 5. Since at least 2003, pre-arraigned misdemeanor arrestees at CRF were not subject to strip searches on a routine basis, either before or after their first court appearance, such as arraignment. UMF 6.

In the other KCSO jail facilities, such as Lerdo, inmates are housed based upon their classification. UMF 7. Each inmate's classification is determined by a multitude of factors including, but not limited to, gang affiliation; mental and medical status; conduct while at the facility; past conduct while incarcerated, whether at Lerdo or at a different facility; and, the nature of the charges that caused them to be in custody. UMF 8.

The inmate population housed at Lerdo has exploded in recent years and the facilities cannot be used as originally intended. UMF 9. The various Lerdo facilities were originally intended to function as their names describe. UMF 10. Over time, the Lerdo facilities have been forced to house inmates together according to the security risk that each inmate poses and the other classification factors cited above, rather than merely whether an inmate has not been tried, for example. UMF 11. Thus, the name of the particular Lerdo facility does not determine where the inmate is housed nor does it necessarily accurately describe the security risk or type of inmate housed there. UMF 12. At the Lerdo Max-Med facility, there are two blocks of 17 cells that house one inmate per cell. UMF 13. These single cells contain a toilet. UMF 14. The toilet in each cell

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does not have any provision for privacy and the view of the cell contents and the toilet is open to anyone passing in the corridor in front of the cells, including other inmates and custodial staff. UMF 15. In these cell blocks, there are two shower cells that each allows showering by one inmate at a time. UMF 16. Like the toilet, these showers are open to the view of anyone passing through the corridor outside of the cell. UMF 17.

Other than these two blocks of cells at the Max-Med facility, there are two tiers of cells, approximately 14 cells, that house between six and twelve inmates. UMF 18. Each cell has a toilet for use by the inmate assigned to the cell. UMF 19. There is no provision for privacy in these cells and toileting is done within full view of other inmates. UMF 20. The remaining "cells" are dormitory style which house up to 31 inmates. UMF 21. Like the other cells, the toileting provisions are open to view by other inmates and custodial staff. UMF 22. Similarly, the shower facilities are "gym-style" in which there are two walls of shower heads within the shower room which allow multiple inmates to shower at the same time. UMF 23. As a result, showering and undressing/dressing is done within the view of other inmates. UMF 24.

At the Lerdo Minimum facilities, inmates are housed "barracks style." UMF 25. Each of these barracks houses approximately 41 inmates. UMF 26. Although the toilets and showers are situated in separate rooms connected to the barracks, toileting and showering – including dressing and undressing related to showering – occur within the view of the other inmates who are present in the toilet or shower room. UMF 27.

Inmates are not permitted to leave their housing assignment for the purpose of using a toilet in a different area unless the inmate had a medical issue that required it and then the inmate's housing assignment would likely be changed to the medical clinic. UMF 28. However, other than a medical reason, an inmate would not be permitted to leave their housing unit to use a preferred toilet elsewhere. UMF 29.

B. Contraband in KCSO Facilities and Related Inmate Searches

Inmate possession of contraband is an extreme problem for all of the KCSO jail facilities. Within the last five years, approximately 915 inmates in the Lerdo facility have been found guilty of violating the facility rule that prohibits inmates from making or possessing contraband that poses

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a hazard to health, safety, or facility security. UMF 30. The contraband located commonly includes drugs, weapons, and escape tools. UMF 31. Additionally, approximately 986 inmates have been found guilty of violating the facility rules prohibiting other types of contraband. UMF 32. These statistics cannot demonstrate the deterrent effect of searches, since inmates were less likely to move or carry contraband when they knew they were going to be strip searched. UMF 33. Since September of 2007, strip searches has discovered inmate possession of contraband in approximately 22 incidents. UMF 34.

Procedure D of KCSO Policy C-500 specifies that persons in the general inmate population (not pre-arraignment detainees) "may be subjected to a strip search or visual body cavity search in the following situations: after leaving and then returning to the facility (i.e., medical appointment, court, etc.); after completing their assigned duties inside or outside the facility and returning to their housing area; after any contact visit; and, if an officer has a reasonable suspicion that they are concealing a weapon or contraband and that a strip search or visual body cavity search will result in discovery of the weapon or contraband." UMF 35. Inmates are subject to strip searches when they return from court appearances because they mingled with other inmates from their housing unit, other units and other Lerdo jail facilities on the transport bus and while at court. UMF 36. Given the amount of contraband that was discovered at the jail facilities, KCSO officers believe that inmates frequently obtain this contraband as a result of the court contact. UMF 37. For example, inmates somehow obtain portions of latex gloves, in particular the fingers of the gloves, and use the latex to envelope contraband. UMF 38. The inmates then place the contraband in their rectums for transport back to the Lerdo facility. UMF 39. The reasonable belief regarding the source of contraband in KCSO jails is supported by the sworn testimony of Plaintiff Marsial Lopez, who testified that sometimes when the inmates who were returning from court were strip searched, officers discovered contraband on their person hidden in pieces of a latex gloves. UMF 40. Even then, despite being strip searched, Lopez testified that inmates were still sometimes able to get contraband into the jail facility. UMF 41.

Failure to locate contraband possessed by KCSO prisoners has proven to have potentially life-threatening consequences. In a widely publicized incident in 2007, convicted mass-murderer

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managed to secrete a fabricated handcuff key in his hair during a visit to court. UMF 42. This key was discovered during a strip search of his person. UMF 43. In another incident, a murder suspect was strip searched related to a court appointment in May of 2007. UMF 44. A razor blade was discovered in his shoe. UMF 45. In May of 2008, this same inmate was transported to a hospital without being strip searched. UMF 46. He produced a stolen handcuff key, removed his restraints, and fled. UMF 47. He was recaptured by deputies, but not before he broke into an occupied apartment in an attempt to evade the pursuit. UMF 48.

By March 2005, the jail population had grown to such an extent that the available man-power had been outstripped by the size of the population. UMF 49. To meet the other staffing/security needs of the various facilities, frequently as few as one or two detention deputies were available to conduct strip searches at any given time. UMF 50. Other operations could not be scheduled around court returns because the timing and number of inmates returning to a particular Lerdo facility was unpredictable. UMF 51. In addition, the limited space at the Lerdo facilities, dictated that individual searches could not occur in a timely fashion. UMF 52. This would have meant that, while the individual searches were occurring, the rest of the inmates had to wait in holding cells. UMF 53. This problem was complicated further by the fact that inmates of different housing classifications could not be held together to await their search due to the probability of violence that this would incite. UMF 54. Commingling inmates outside of their classifications would have been a safety risk to the inmates and a threat to the internal security of the facility. UMF 55. Even commingling inmates of the same classification in close quarters for the amount of time required to conduct the individual searches would have posed the potential for a violent exchange which was a threat to the security of the jail. UMF 56. Additionally, in most cases, those inmate who had been searched would also have to be placed in separate holding cells, segregated by classification, or staff would have to be assigned to individually escort each searched inmate back to his/her housing unit. UMF 57. Thus, to individually strip search each inmate returning from court would effectively require a doubling of the already limited holding cells or enough staff to individually escort each searched inmate back to his/her housing unit. UMF 58.

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Therefore, the sheer number of inmates that were transported to and from various appointments outside of the Lerdo facility on a daily basis, meant there was no way to conduct individual strip searches in a timely fashion. UMF 59. For example, individual searches of inmates returning from court, would have taken hours to complete. UMF 60.

Generally, the point of entry at the Lerdo facility for any inmate transported to the Lerdo Minimum facility for housing for the first time or after attending court is a room known as "Gate 1." UMF 61. From March 2005 through October 2007 generally, no more than about 20 to 25 inmates were searched at Gate 1. UMF 62. From March 2005 through October 2007, when inmates were returned to their housing assignment at the Pretrial facility generally no more than about 10 to 15 inmates were searched at one time. UMF 63. From March 2005 through October 2007, when inmates were returned to their housing assignment at the Max-Med facility generally no more than about 5 to 7 inmates were searched at one time. UMF 64.

III.

LEGAL STANDARD

If there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law, then the court must make an order granting movant's motion for summary judgment. Fed. R. Civ. P. 56(c).

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986).

Once a movant's initial burden is met, the burden shifts to the opponent, who must then produce specific facts beyond the pleadings and show the existence of genuine disputes of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87 (1986). The opposing party cannot establish disputed material facts by relying on allegations in his or her pleadings, but must tender admissible evidence showing the genuineness of the dispute regarding material issues. Depoali v. Carlton, 878 F.Supp. 1351, 1357 (E.D. Cal. 1995). Summary judgment should be granted

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"so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, set forth in Rule 56(c) is satisfied." Celotex, 477 U.S. at 323.

The moving party need not present any evidence on those matters where the opposing party will have the burden of proof at trial. Id. at 325. With respect to claims for which the opposing party bears the ultimate burden of proof, the moving party's burden is met by demonstrating the absence of evidence supporting the opposing party's claim. Id. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id. at 322. To demonstrate a genuine issue, the opposing party,

> must do more than simply show that there is some metaphysical doubt as to the material fact ... where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Matsushita, 475 U.S. at 586.

IV.

PLAINTIFFS HAVE FAILED TO DEMONSTRATE ANY VIOLATION OF THEIR FOURTH AMENDMENT RIGHTS ARISING OUT OF THE GROUP STRIP SEARCHES BECAUSE THEY FAIL TO ESTABLISH ANY LEGITIMATE EXPECTATION OF PRIVACY

Prisons and detention facilities are "places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others." Hudson v. Palmer, 468 U.S. 517, 526 (1984). Indeed, the courts recognize that jails and prisons are places of confinement that necessarily result in a prisoner's loss of freedom of choice and privacy. Bell v. Wolfish, 441 U.S. 520, 537 (1979); Peckharn v. Wisc. Dept. of Corr., 141 F.3d 694, 696-697 (7th Cir. 1998); Johnson v. Phelan, 69 F.3d 144, 146 (7th Cir. 1995); Bell v. Wolfish, 441 U.S. 520, 559 (1979). In Hudson, the Supreme Court clarified reasonable expectations of privacy in a penological setting, holding that "society is not prepared to recognize as legitimate any subjective expectation of privacy[.]" 468 U.S. at 526. An intrusion by jail officials pursuant to a rule or policy

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with a justifiable purpose of imprisonment or prison security is not violative of the Fourth Amendment. United States v. Dawson, 516 F.2d 796, 805-806 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975); United States v. Savage, 482 F.2d 1371, 1373 (9th Cir.), *cert. denied*, 514 U.S. 932 (1973).

While the Fourth Amendment prohibits searches which are unreasonable, the Supreme Court has held that the reasonableness of a challenged search in the prison context is dependant upon a balancing between the rights of prisoners against the need for the particular search. Bell, 441 U.S. at 559; see Hudson, at 527 (determining whether an expectation of privacy is "legitimate" or "reasonable" necessarily entails a balancing of interests). Among the factors considered are "the scope of the particular intrusion, the justification for initiating it, and the place in which it is conducted." Id. Although the Ninth Circuit Court of Appeals has recognized that prisoners retain limited rights to bodily privacy under the Fourth Amendment, those rights must be determined in reference to the prison context. Thompson v. Souza, 111 F.3d 694, 699 (9th Cir. 1997) (internal quotations omitted) (citing Michenfelder v. Sumner, 860 F.2d 328, 333-34 (9th Cir. 1988)). Moreover, in achieving an acceptable balance between prison security and rights of prisoners, courts are deferential to the experienced judgment of prison administrators. See, e.g., Sandin v. Conner, 515 U.S. 472 (1995); Turner v. Safley, 482 U.S. 78, 85 (1987); Bell, 441 U.S. at 540 n.27, 547. As observed by the Supreme Court in Bell:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[Central] to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee ... the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

441 at 546-47.

Given such security concerns, it is reasonable and not unconstitutional for jail officials to conduct regular strip searches of detainees involving visual body-cavity inspections . Bell, 441 U.S.

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at 558-560. Thus, a prisoner claiming a constitutional violation arising out of a strip search has a "heavy burden" of proving (1) that a strip search was not rationally related to a legitimate security interest, and (2) that it was conducted in a harassing manner intended to humiliate and inflict psychological pain. Bell, 441 U.S. at 561-62; Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004); Calhoun v. Detella, 319 F.3d 936, 939 (7th Cir. 2003).

Here, Plaintiffs cannot satisfy the first element of their burden of proof because the facts establish that there were legitimate, identifiable security reasons to conduct visual body searches in groups. The body searches clearly were done with penological justification and KCSO had and continues have the responsibility of holding inmates and other prisoners in custody pending trial as well as after sentencing. This responsibility includes the need to maintain safety and order for both the inmates and the staff of each facility. Defendants have proffered clear evidence regarding the necessity of security for conducting the searches themselves as well as conducting the searches in small groups. The undisputed facts clearly establish that in the last five years, approximately 1,900 inmates in KCSO custody have been found guilty of having some type of prohibited contraband. The undisputed facts also establish that since September 2007, KCSO has discovered contraband possessed by 22 inmates as a result of the strip searches. Indeed, the sworn testimony of Plaintiff Lopez corroborates the fact that prisoners were able to pass contraband after being out of the facility for court appearances. Thus, increased vigilance remains essential in order to discover and deter any activity involving contraband. Defendants have also provided herein specific examples of extremely dangerous inmates who were found with contraband when strip searched, as well as the consequences of what happens when inmates are not strip searched. Thus, because KCSO had legitimate security reasons for the body searches, the searches had penological justification and cannot be found to be unconstitutional. See Bell, 441 U.S. at 558-62; Peckham, 141 F.3d at 695, 697; Koger v. Snyder, 252 F.Supp.2d 723, 725-26 (C.D. Ill. 2003).

Plaintiffs also cannot demonstrate that the searches, as conducted in a group, were excessive in their performance or that they amounted to calculated harassment unrelated to jail needs and done with the intent to humiliate and inflict psychological pain. Whitman, 368 F.3d at 934. The undisputed facts establish that the severe personnel limitations in conjunction with security concerns

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warrant that the best means for officers to conduct the searches and to maintain institutional security were to conduct the searches in small groups. In a matter similar to this case, the plaintiffs in Fernandez v. Rapone, 926 F.Supp. 255 (D.Mass. 1996), also alleged that their constitutional rights had been violated because they had been strip searched in front of other inmates and officers. See id. at 262. There, the court noted that in the prison setting, inmates share cells with other prisoners and shower with fellow inmates. Id. Likewise, the defendants contended, and the court agreed, that "[t]hroughout the day, the inmates, 'whether dressing, bathing or even defecating,' are observed by fellow inmates and male and female correction officers." Id. Accordingly, the "defendants properly maintain that standing naked within the possible view of other inmates for a brief period of time is 'hardly shocking or unreasonable in light of the vital security interest [the searches seek] to preserve against the backdrop of day to day prison life.'" Id. Therefore, the District Court concluded "that the fact that plaintiffs were often searched in the presence of other inmates being searched [did] not render the searches unreasonable." Id.

Similarly, in Zunker v. Bertrand, 798 F. Supp. 1365 (E.D.Wis. 1992), the district court held that an inmate's "privacy interest in not having other inmates view the strip searches [did not outweigh] the security interests of the prison [and, therefore,] as a matter of law…even if other inmates observed plaintiff being strip searched, his constitutional rights were not violated." Id. at 1370; see also United States v. Cofield, 391 F.3d 334, 337(1st Cir. 2004) (strip search in hallway near booking desk was not unconstitutional); Franklin v. Lockhart, 883 F.2d 654 (8th Cir. 1989) (upholding constitutionality of visual body cavity searches in a hallway within view of inmates in nearby cells and in passageway in groups of four); Thompson, 111 F.3d at 701 (9th Cir. 1997) (rejecting plaintiff's claim that the strip searches should have been conducted out of the view of other prisoners, in a more private location).

Defendants note that the district court in Craft v. County of San Bernardino, 468 F.Supp.2d 1172 (C.D. Cal. 2006), took a different view in regard to the group search issue. However, the fact that the searches at issue in Craft occurred in group settings was only one of the factors the court considered in reaching its decision. Id. The decision was limited to those *pre-arraignment* prisoners who were strip searched before being transferred to another unit and arrestees returning from court

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who had been found to be entitled to release. Id. at 1180. In Craft, it was the policy of the detention facility to strip and/or visual body cavity search all arrestees (including those booked on non-violent, non-drug related charges) prior to arraignment, regardless of individualized suspicion to conduct the strip and/or visual body cavity search on the arrestee. Id. at 1174. The defendants in Craft contended that the searches were necessary for security reasons, but the court disagreed, stating that evidence the defendants provided showed only two discoveries of contraband in nearly two years. Id. The evidence provided by Defendants also did not specify whether the discoveries were made pursuant to a search of a pre-arraignment transferee (the group at issue in the case), or of some other group. See id.

More important, the binding precedent of the Ninth Circuit has rejected the argument that strip searches must be conducted in a private place outside of view of other inmates. Thompson, 111 F.3d at 701 (9th Cir. 1997); Michenfelder, 860 F.2d at 333. The Craft court, by comparison, relied almost exclusively on Way v. County of Ventura, 445 F.3d 1157 (9th Cir. 2008), to conclude that the group strip searches in San Bernardino County were improper. However, Way, like Craft, also is distinguishable. The Ninth Circuit in Way recognized the intrusive nature of the strip search, just as it did in Thompson, and also recognized "the difficulty of operating a detention facility safely, the seriousness of the risk of smuggled weapons and contraband, and the deference we owe jail officials' exercise of judgment in adopting and executing policies necessary to maintain institutional security." Id. at 1161 (citing Wolfish, 441 U.S. at 546-47). However, unlike here, the Defendants in Way "failed to show any link between their blanket strip search policy and legitimate security concerns[.]" Id. Instead, the defendants "made only a conclusory submission that the purpose of the search protocol is 'to provide facility security and to ensure the inmate's health and safety[.]'" Id. By comparison, the Way court noted that evidence in the record in Wolfish established detainees' attempts to secrete money, drugs, weapons and other contraband in body cavities. Id.; see Wolfish, at 559.

This case is easily distinguishable from both Craft and Way. Here, the Court is not asked to consider searches of pre-arraignment detainees; rather, the searches pertain to post-arraignment and in some cases post-conviction and sentenced inmates. Moreover, as discussed above, the

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undisputed facts clearly establish 1) the need to conduct the searches; and, 2) the need to conduct the searches in small groups. Certainly, the undisputed facts establish the success that has been realized in preventing the introduction of contraband into the KCSO jail facilities through strip searches. The facts also establish that the staffing limitations coupled with the ever-increasing inmate population and their related security risk require that the optimal means for corrections officers to conduct the searches and to maintain institutional security for staff and inmates were to conduct the searches in small groups. Thus, the group strip searches do not violate the Fourth Amendment rights of Plaintiffs or any other inmate incarcerated in KCSO custody and Defendants' Motion for Summary Adjudication in this regard should be granted.

V.

THE GROUP SEARCHES AT ISSUE DO NOT VIOLATE PLAINTIFFS' RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

In Bell, the Supreme Court enunciated the appropriate legal standard for evaluating the constitutionality of a strip search involving a post-arraignment detainee. 441 U.S. at 535. "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Id. The inquiry for purposes of the Fourteenth Amendment protection in Bell requires the court to determine whether there was an express intent to punish, or "whether an alternative purpose to which [the strip search] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Id. at 538 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). Absent evidence of express punitive intent, the Ninth Circuit has noted that "to constitute punishment, the harm or disability caused the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." Demery v. Arpaio, 378 F.3d 1020, 1030 (9th Cir. 2004).

Here, as discussed at length above in regard to Plaintiffs' Fourth Amendment claim, there are no facts to suggest that any of the Plaintiffs were strip searched as a means for punishment – whether they were searched alone or while in a small group. The rational basis for conducting the strip search is permitted for security concerns as a matter of law. The need for these searches to be conducted as a group in light of the staff constraints proportionate to inmate population. There are

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no facts to indicate that strip searching inmates in front of other inmates was punishment, nor can it be said that the group searches significantly exceed the inherent discomforts of confinement, particularly where inmates regularly observe each other showering and toileting due to the standard conditions of incarceration. Thus, Defendants' practice of searching of inmates in small groups does not violate Plaintiffs' constitutional rights under the Fourteenth Amendment and Defendants respectfully request that their Motion for Adjudication should be granted as a matter of law.

VI.

PLAINTIFFS' EQUAL PROTECTION CLAIM FAILS BECAUSE OF THE INHERENT DIFFERENCES BETWEEN POST-ARRAIGNMENT DETAINEES AND POST-SENTENCING PRISONERS

Any alleged differential treatment between post-arraignment detainees and pre-arraignment detainees is not unconstitutional. The Equal Protection Clause of the Fourteenth Amendment commands that no state shall deny any person the equal protection of the laws. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). As a result, "all persons similarly circumstanced shall be treated alike." Plyler v. Doe, 457 U.S. 202, 216 (1982) (quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

Generally, when state action is challenged on equal protection grounds, either strict scrutiny or the rational basis analysis is applied. Hoffman v. United States, 767 F.2d 1431, 1434 (9th Cir. 1985). Strict scrutiny applies when the state's classification is alleged to have been made on "suspect" grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. Id. at 1434-35. When no suspect class is involved and a fundamental right has not been burdened, a rational basis test to determine the legitimacy of the state's classifications is appropriate. Kahawaiolaa v. Norton, 386 F.3d 1271, 1277-78 (9th Cir. 2004).

While strict scrutiny has been applied to prison classifications based on a suspect class, such as race, the Supreme Court has not concluded that the burdening of prisoners' fundamental rights in subject to the same. Johnson v. California, 543 U.S. 499 (2005). In Turner, *supra*, the Supreme Court held that when "a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. As discussed

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above, the reasonable-relationship test is applicable only to those rights which are "inconsistent with proper incarceration." Johnson, 543 U.S. at 510 (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)). Accordingly, imprisonment permits the greater restriction of constitutional rights than would otherwise be valid and many constitutional rights enjoyed prior to incarceration are curtailed or lost upon imprisonment. Beard v. Banks, 126 S. Ct. 2572, 2577-78 (2006); Overton, 539 U.S. at 128.

Nevertheless, with respect to the extent of curtailment of privacy rights, the Ninth Circuit has concluded it does not violate the Constitution for such limitations to be same for pretrial detainees as for convicted inmates. United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. Cal. 1996) (citing Bell). The only difference between the two groups for purposes of evaluation under the Constitution is that pretrial detainees are protected by the Fourteenth Amendment's Due Process Clause, as well as specific substantive guarantees of the federal Constitution, such as the Eighth Amendment. Under the Due Process Clause, detainees have a right against jail conditions or restrictions that "amount to punishment." Bell, 441 U.S. at 535-37. This standard differs from the standard relevant to convicted prisoners only with respect to that fact that convicted prisoners may be subject to punishment so long as it does not violate the Eighth Amendment's bar against cruel and unusual punishment. Id. at 535 n.16; see Pierce v. County of Orange, 526 F.3d 1190, 1205 (9th Cir. Cal. 2008). In other words, under Van Poyck, it is constitutionally acceptable to treat these two groups essentially the same as to infringement on privacy. In contrast, the Ninth Circuit also has specifically addressed the lawfulness of strip searches in cases involving pre-arraignment arrestees: "arrestees for minor offenses may be subjected to a strip search only if jail officials have a reasonable suspicion that the particular arrestee is carrying or concealing contraband or suffering from a communicable disease." Giles v. Ackerman, 746 F.2d 614. 615 (9th Cir.1984) (per curiam) (overruled on other grounds by Hodgers-Durgin v. de la Vina, 199 F.3d 1037, 1041 (9th Cir.1999) (en banc)). Factors such as "the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record" determine reasonable suspicion. Giles, 746 F.2d at 617.

Here, Plaintiffs' claim regarding any type of disparate treatment based on prisoner status fails as a matter of law. Plaintiffs overlook the most fundamental aspect of a claim asserted under the

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Equal Protection Clause: that the comparison must be between "persons similarly circumstanced." Plyler, 457 U.S. at 216. Dissimilar treatment of dissimilarly situated persons does not violate equal protection. See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 242 (8th Cir. 1994). Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that he was treated differently than others who were similarly situated to him. See, e.g., Samaad v. City of Dallas, 940 F.2d 925, 940- 41 (5th Cir. 1991). Absent a threshold showing that he is similarly situated to those who allegedly receive different treatment, the plaintiff does not have a viable equal protection claim. Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994).

There can be no debate that pre-arraignment arrestees and post-arraignment prisoners are not similarly situated and therefore the long-standing legal distinctions between the two groups do not violate any tenet of Equal Protection. The critical difference lies in the fact that members of the first group are brought in off the street and await a hearing and formal charges; without reasonable suspicion of possession of contraband or violent tendencies that would constitute a security risk to the jail or staff, there is no grounds for which members of this group may be searched. However, as to post-arraignment prisoners, a court of law has found, already probable cause to charge them with a specific crime. They are returned to the custody of the jail pursuant to court order, where the limitations on their privacy are as diminished as they would be for convicted prisoners in light of their ability to commingle with other members of the general jail population. Further, post-arraignment prisoners are often removed from the secure setting of the jail where, unlike pre-arraignment arrestees who are just entering the jail, they are able to obtain contraband. Furthermore, because post-arraignment prisoners will remain in jail, they have a greater incentive to smuggle in contraband from outside the facility. There simply is no way as a fundamental matter of law to equate these two groups of prisoners for purposes of equal protection, nor have the courts seen fit to do so.

In addition, Plaintiff's allegations regarding the inequality of Penal Code section 4030 must fail. Section 4030 applies only "only to prearraignment detainees arrested for infraction or misdemeanor offenses." Pen. Code § 4030. In other words, Section 4030 was enacted to regulate

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booking searches – i.e., the searches to which all arrestees are subjected regardless of whether they will be released after booking. Specifically, Penal Code section 4030(f) prohibits strip searching an individual arrested on a misdemeanor offense not involving weapons, controlled substances or violence "prior to placement in the general jail population" unless a peace officer has determined that there is reasonable suspicion that the individual is concealing contraband. Cal.Penal.Code §4030(f). Here, Plaintiffs have abandoned their claims regarding certification of strip searches of pre-arraignment detainees because the evidence clearly demonstrates that such searches simply did not happen. The evidence further establishes that only post-arraignment prisoners were ever subjected to strip searches, whether alone or in a group. Because Section 4030 by its terms applies only to arrestees who are strip searched before arraignment, the claims asserted by Plaintiffs or any party they purport to represent as part of a class who were strip searched in groups fails as a matter of law. Moreover, even if Plaintiffs believe that section 4030 is in some way unfair, it is the clear intent of the California Legislature to limit the protections of the statute to a specific class of people. Unless the State Legislature amends Section 4030, its applicability is limited by its terms only to prearraignment detainees – which were undisputedly never searched in a group setting while in KCSO custody. See Wynn v. Nat'l Broadcasting Co., 234 F.Supp.2d 1067, 1112 n.37 (C.D. Cal. 2002) ("In the context of statutory construction, a court's goal is to discern the apparent legislative intent, not to adopt a judicial construction to give that provision the meaning the court might believe most salutary.") (citations omitted).

Thus, Plaintiffs' Equal Protection Clause claim as to persons alleging group strip searches must fail and Defendants request that their motion in this regard be granted.

VII.

PLAINTIFFS' STATE LAW CLAIMS FAIL AS A MATTER OF LAW

Plaintiffs must demonstrate an underlying violation of state or federal law in order to prevail on their claims for violation of California Civil Code section 52.1. See Cal.Civ.Code §52.1. As set forth throughout this Motion, Plaintiffs cannot establish an underlying violation of a constitutional right and/or Penal Code section 4030. Therefore, Defendants respectfully submit that there is no evidence to establish a violation of California Civil Code section 52.1 and, therefore, respectfully

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request that the court enter judgment as a matter of law on the claims arising out of California Civil Code section 52.1 with respect to the group search putative class.

In addition, for the same reasons that Plaintiffs' group search-related claims fail under the federal constitution, they also fail under the California Constitution. See Kasky v. Nike, Inc., 27 Cal. 4th 939, 969 (2002) (in claims asserted under the California Constitution, however, the California Supreme Court often uses the analysis framed by the United States Supreme Court in interpretation of analogous provisions of the federal constitution). Thus, Plaintiffs' judgment should be granted to Defendants with respect to the group search claims asserted under the California Constitution, as well.

VIII.

CONCLUSION

Based on the foregoing, Defendants SHERIFF DONNY YOUNGBLOOD, FORMER SHERIFF MACK WIMBISH, COUNTY OF KERN and KERN COUNTY SHERIFF'S OFFICE respectfully request that their joint Motion for Summary Adjudication of the federal claims pertaining to persons alleging group strip searches while in KCSO custody be granted.

Respectfully submitted,

Dated: July 17, 2008

PORTER SCOTT
A PROFESSIONAL CORPORATION

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COUNTY OF KERN

Dated: July 17, 2008

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