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19
20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22 MARY BULL, et al.,

23 Plaintiffs,

24 vs.

25 CITY AND COUNTY OF SAN FRANCISCO, et al.,

26 Defendants.

Case No. C 03-1840 CRB

JOINT STATUS CONFERENCE REPORT

DATE: April 20, 2012

TIME: 8:30 a.m.

CTRM: 6, 17th Floor

JUDGE: Hon. Charles R. Breyer

1 On July 5, 2011, the Court issued its Minute Order granting Defendants' Motion to Stay all
 2 proceedings¹ in this case pending the issuance of the United States Supreme Court's decision in *Florence*
 3 *v. Board of Chosen Freeholders of County of Burlington, et al.* On April 2, 2012, the Supreme Court
 4 issued its *Florence* decision and, on April 10, 2012, this Court scheduled a status conference in the
 5 above-captioned matter for 8:30 a.m. on April 20, 2012. Although no status conference report was
 6 ordered filed, the parties have conferred and elected to file this joint status conference report in an effort
 7 to assist the court, albeit the day before the scheduled conference.
 8

9
 10 **I. STATUS OF THE CASE AT THE TIME OF THE STAY**

11 At the time the Court ordered all proceedings in this matter stayed, pending decision of the
 12 Supreme Court in *Florence*, the Court had before it Plaintiffs' Amended Motion to Redefine the Certified
 13 Class², then set for hearing on July 29, 2011. No opposition had been filed prior to the court's stay of all
 14 proceedings.
 15

16 Plaintiffs' Amended Motion to Redefine the Certified Class proposed the following redefined
 17 classes:

18 The class is redefined to include all persons in the previously
 19 certified class who, in the period from and including April 23, 2001, to on
 20 or about January 21, 2104 [sic], were arrested and subjected to pre-
 21 arraignment strip and/or visual body cavity search at the San Francisco Jail,
 22 in the following subclasses (hereinafter referred to as newly defined
 23 classes):

24 (a) (Class One) detainees in defendants' custody who are members of the
 25 previously certified class subjected to *second* strip and visual body cavity
 26 searches upon their initial arrival in their housing units, prior to being
 27

28
 1 ¹ In view of the impending relocation of one of the representative plaintiffs, Sister Bernie Galvin, the court permitted the parties to take her deposition to preserve her testimony for trial in the event she were unavailable. That deposition was taken on August 12, 2011.

2 ² Plaintiffs had initially moved to redefine the certified class on October 8, 2010, following the Ninth Circuit's *en banc* decision on Defendants' interlocutory appeal of this Court's denial of Defendant Hennessey's Motion for Qualified Immunity for his decision to create a blanket policy of strip searching all individuals classified for housing.

1 intermingled with the general population, after they have already been strip
2 searched at County Jail 9: there is no rational penological purpose for such
successive strip searches in the absence of reasonable suspicion;

3 (b) (Class Two) detainees in their custody who are members of the
4 previously certified class who were subjected to strip searches without
5 reasonable suspicion at County Jail 9 without being classified for housing
in the general population: there is no rational penological purpose for such
strip searches in the absence of reasonable suspicion;

6 (c) (Class Three) misdemeanor detainees in their custody, who are
7 members of the previously certified class, eligible for the protection of
8 California Penal Code Section 4030, who were subjected to strip searches
9 in violation of Penal Code Section 4030(f), which provides that "no person
10 shall be subjected to a strip search or visual body cavity search prior to
11 placement in the general jail population, unless a peace officer has
12 determined there is reasonable suspicion based upon specific and
13 articulable facts to believe such person is concealing a weapon or
14 contraband, and a strip search will result in the discovery of the weapon or
15 contraband. No strip search or visual body cavity search or both may be
16 conducted without the prior written authorization of the supervising officer
17 on duty. The authorization shall include the specific and articulable facts
18 and circumstances upon which the reasonable suspicion determination was
19 made by the supervisor."

14 **II. FLORENCE DECISION**

15 Before the Court issued its Order staying all proceedings in this matter, the parties, in their
16 memoranda supporting and opposing the requested stay, had stated their respective understandings of the
17 issues likely to be decided by the Supreme Court. Defendants observed that the Supreme Court would
18 address "Whether the Fourth Amendment permits a jail to conduct a suspicionless strip search of *every*
19 individual arrested for *any* minor offense *no matter what the circumstances.*" (Defendants' Memorandum
20 of Points and Authorities in Support of Motion to Stay Proceedings, Doc. # 370, p. 3., citing Question
21 Presented upon which U.S. Supreme Court granted certiorari in *Albert W. Florence v. Board of Chosen*
22 *Freeholders of the County of Burlington, et al.*, No. 10-945 (emphasis added)). Defendants further
23 stated that "The *Florence* case presents legal issues that are directly relevant to the *Bull* case, including
24 (1) the constitutionality of suspicionless strip searches of pre-trial detainees arrested for minor offenses
25 under any circumstances and (2) the constitutionality of second strip searches following a detainee's
26 movement from one jail facility to another (which issue plaintiffs in *Bull* have made a major component
27
28

1 of their remaining case). *Id.* at 3. Plaintiffs stated that the Supreme Court, if it confined itself to the
 2 question decided below in *Florence*, would only address “the constitutionality of strip searches upon
 3 admission to the general population” (Plaintiffs’ Memorandum of Points and Authorities in Opposition to
 4 Defendants’ Motion for Stay, Doc.# 373, p. 3.)

6 **III. PLAINTIFFS’ POSITION**

7 While the full import of the Supreme Court’s decision in *Florence* is subject to debate, Justice
 8 Kennedy, writing for the Court³, explicitly noted that “This case does not require the Court to rule on the
 9 types of searches that would be reasonable in instances where, for example, a detainee will be held
 10 without assignment to the general jail population and without substantial contact with other detainees.”
 11 Furthermore, Justice Kennedy wrote, “The circumstances before the Court, however, do not present the
 12 opportunity to consider a narrow exception of the sort Justice Alito describes, post, at 2-3 (concurring
 13 opinion), which might restrict whether an arrestee whose detention has not yet been reviewed by a
 14 magistrate or other judicial officer, and who can be held in available facilities removed from the general
 15 population, may be subjected to the types of searches at issue here.” (566 U.S. ____ (2012), pps 18 and 19
 16 of the slip opinion.)

17
 18 Justice Alito in his concurring opinion, made clear that “The Court holds that jail administrators
 19 may require all arrestees *who are committed to the general population of a jail* to undergo visual strip
 20 searches not involving physical contact by corrections officers.”⁴ In that section of his concurring
 21 opinion referred to by Justice Kennedy, Justice Alito stated:

22
 23 It is important to note, however, that the Court does not hold that it is *always* reasonable to
 24 conduct a full strip search of an arrestee whose detention has not been reviewed by a

25
 26 ³ Except as to Part IV of the opinion which Justice Thomas did not join.

27 ⁴ Justice Alito noted that Florence was detained “not for a minor traffic offense but instead pursuant to a
 28 warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.”

1 judicial officer and who could be held in available facilities apart from the general
2 population. Most of those arrested for minor offenses are not dangerous, and most are
3 released from custody prior to or at the time of their initial appearance before a magistrate.
4 In some cases, the charges are dropped. In others, arrestees are released either on their
5 own recognizance or on minimal bail. In the end, few are sentenced to incarceration. For
6 these persons, admission to the general jail population, with the concomitant humiliation
7 of a strip search, may not be reasonable, particularly if an alternative procedure is feasible.
8 (Alito, concurring opinion, pps 1 and 3.)

9 Justice Roberts, specifically joining Justice Alito's concurring opinion, stated that "it is important
10 for me that the Court does not foreclose the possibility of an exception to the rule it announces."
11

12 (Roberts, concurring opinion, p. 1.)

13 The dissenting opinion noted that "it remains open for the Court to consider whether it would be
14 reasonable to admit an arrestee for a minor offense to the general population, and to subject her to the
15 'humiliation of a strip search,' prior to any review by a judicial officer." (Dissenting opinion, p. 14.)

16 Plaintiffs believe that the Supreme Court resolved a narrow question that was not seriously in
17 dispute in this case: whether the Fourth Amendment precludes a jail from strip searching a person
18 properly placed in the jail's general population. The Supreme Court did **not** sanction the strip search of
19 persons arrested on charges not involving violence, drugs or weapons, without reasonable suspicion that
20 such persons were concealing contraband, prior to such persons being properly placed into the general
21 population. This is the second subclass described by Plaintiffs in their Motion to Redefine the Certified
22 Class.

23 In ruling that the Fourth Amendment did not preclude the strip search of persons properly
24 admitted to the jail's general population, the Court did not address the question of the legality of
25 repetitive, pre-arraignment strip searches, of persons properly placed into the general population. This is
26 the first subclass defined in Plaintiffs' Motion to Redefine the Certified Class. Plaintiffs request that the
27 Court set a hearing date on Plaintiffs' Amended Motion to Redefine the Class to resolve these remaining
28 issues.

Plaintiffs' Complaint in this case alleged that the blanket pre-arraignment strip search of persons

1 charged with crimes not involving violence, drugs, or weapons, without reasonable suspicion that such
2 persons were concealing contraband, violated their Fourth Amendment right to be free from
3 unreasonable searches and seizures. While the Ninth Circuit's *en banc* decision approved of the
4 Defendants' policy of subjecting all persons going into the general population to strip searches,
5 regardless of the charges on which they were arrested or the lack of reasonable suspicion to believe they
6 were concealing contraband, and despite their not having first appeared before a judicial officer for
7 arraignment, bail setting, or consideration of a request for release on his/her own recognizance, in view
8 of the Supreme Court's reservation of this question for future decision, Plaintiffs' believe that once
9 judgment is entered in this case, this issue will be ripe for reconsideration in light of the Supreme Court's
10 Florence decision and, should it again be decided adversely to Plaintiffs, for presentation to the Supreme
11 Court through a Petition for Writ of Certiorari.

14 **IV. DEFENDANTS' POSITION**

15 Without at this time providing a full analysis of the *Florence* decision and its impact on the
16 instant litigation, defendants believe that the *Florence* decision leaves fully intact the Ninth Circuit's
17 decision in *Bull* and, moreover, announced important standards, principles and rationale that affirm
18 defendants' position in this case. For example, the *Florence* court: (1) adopted the *Turner v. Safley*, 482
19 U.S. 78 (1987) standard (a regulation impinging on an inmate's constitutional rights must be upheld "if it
20 is reasonably related to legitimate penological interests"); (2) reaffirmed *Bell v. Wolfish*, 441 U.S. 520
21 (1979); (3) reaffirmed the importance of providing deference to correctional officials; (4) found that "the
22 seriousness of an offense is a poor predictor of who has contraband," 566 U.S. ____ (2012), p. 14 of the
23 slip opinion; and (5) provided guidance that will impact plaintiffs' proposed second strip search class.
24 The *Florence* decision will provide important guidance for the remainder of the instant litigation.

25
26 Defendants' position on how best to proceed in this case is to first identify a hearing date for
27 Plaintiffs' Amended Motion to Redefine the Certified Class that is approximately sixty (60) days out or
28

1 so. Following the hearing and the Court's ruling on Plaintiffs' Amended Motion to Redefine the Certified
2 Class, defendants plan to bring one or more motions for summary judgment. Defendants believe that this
3 is the best way to narrow and define precisely what is currently left in the case.

4
5 **V. POSSIBLE RESOLUTION THROUGH MEDIATION**

6 In telephone conversations counsel for the parties discussed the possibility of participating in
7 mediation and the possibility of utilizing retired U.S. District Court Judge Raul Ramirez or Magistrate
8 Judge Joseph C. Spero as a mediator. The parties will be prepared to discuss their positions on this issue
9 at the status conference.

10
11 DATED: April 19, 2012

Respectfully Submitted,

LAW OFFICE OF MARK E. MERIN and
CASPER, MEADOWS, SCHWARTZ & COOK

12
13
14 /s/ "Mark E. Merin"
15 By: _____
16 Mark E. Merin
Attorneys for Plaintiffs

17 DATED: April 19, 2012

Respectfully Submitted,

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21 /s/ "Robert A. Bonta"
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