

UNITED STATES DISTRICT COURT  
District of Maine

LAURIE TARDIFF, ) Docket No. 02-251-PC  
 )  
Plaintiff )  
 )  
v. )  
 )  
KNOX COUNTY, DANIEL DAVEY, )  
JANE DOE and JOHN DOE, )  
Defendants )  
 )

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF PROPOSED  
INJUNCTIVE ORDER**

**I. INTRODUCTION**

The Defendants have filed, of even date, a proposed injunction.<sup>1</sup> The Defendants have presented the Plaintiff with a detailed injunctive order, and have explained in separate

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<sup>1</sup> The issue of circumstances under which the Defendants would conduct strip searches in the future was discussed during a judicial settlement conference. At the conclusion of the conference the parties signed a Settlement Agreement drafted by the judicial officer conducting the settlement. The Agreement set forth certain specific terms of the agreement, and then referred to the Amended Settlement Agreement in *Nilsen v. York County* with respect to “provision and procedures” contained therein. This Settlement Agreement, drafted by the judicial officer, and signed by counsel for the parties, contained no reference to an injunction. Subsequent to the settlement conference, however, Plaintiff insisted that an injunction had been agreed to. Defense counsel for the County and the Sheriff (Peter Marchesi, Esq. and John Wall, Esq.), independent counsel for the Sheriff (Toby Dilworth, Esq.), and independent counsel for the County (Timothy Woodcock, Esq.) all concur that there was no agreement that an injunction would issue. To the contrary, consistent with the Settlement Agreement in *Nilsen v. York County*, the Defendants would agree to conduct strip searches in conformity with applicable law from the United States Supreme Court, the First Circuit and this Judicial District. Notwithstanding their serious reservations about adding a term to the settlement not previously contemplated specifically, and recognizing that an agreement to conform their conduct in a certain respect would likely be as enforceable as a formal injunction, *see generally Rufo v. Inmates of the Suffolk County Jail, et al.*, 502 U.S. 367 (1992), the Defendants agreed to the

communication to Plaintiff's counsel the reasoning underlying the content of their proposed order.<sup>2</sup>

The Defendants request that the injunctive Order embody two simple and straight forward provisions: (1) that the Order accurately reflect current law in the First Circuit with respect to strip searches of pretrial detainees, and (2) that the injunction be flexible so that it is coterminous with Fourth Amendment law from the United States Supreme Court, the First Circuit Court of Appeals and this Court with respect to strip searches of pretrial detainees, as that law may evolve in the future. Stated simply, Defendants agree to conform their conduct to the law in this area as it exists not only at the present time, but as that law may evolve. Because the Order proposed to the Defendants by the Plaintiff is overly restrictive with respect to the circumstances under which strip searches may be conducted, and because, by its very terms, it prohibits future modifications, the Defendants cannot agree to that proposed Order.<sup>3</sup>

## **II. MEMORANDUM OF LAW**

### **A. THE CURRENT STATE OF THE LAW IN THE FIRST CIRCUIT PERMITS STRIP SEARCHES ON ANY PERSON CHARGED WITH A CRIME INVOLVING WEAPONS, DRUGS OR CONTRABAND, OR VIOLENT FELONIES, AND ON ANY PERSON FOR WHOM THE CIRCUMSTANCES PROVIDE INDIVIDUALIZED REASONABLE SUSPICION THAT SUCH PERSON IS CONCEALING DRUGS, WEAPONS OR OTHER CONTRABAND.**

At the present time, First Circuit law prohibits strip searches of individuals charged with minor offenses in the absence of individualized reasonable suspicion. *Roberts v. Rhode Island*, 239 F.3d 107, 110 (1<sup>st</sup> Cir. 2001) (citing *Swain v. Spinney*, 117 F.3d 1, 7 (1<sup>st</sup> Cir. 1997)).

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issuance of an injunction without agreeing to the content thereof. *Letter from Peter T. Marchesi, Esq. to Judge Gene Carter* dated October 3, 2006.

<sup>2</sup> The order proposed to Plaintiff is the same order filed of even date. The communication to Plaintiff's counsel is marked as Exhibit 1 and annexed hereto.

<sup>3</sup> The Order proposed by the Plaintiff to the Defendant is marked as Exhibit 2 and annexed hereto.

Reasonable suspicion may arise either from individual circumstances, or from the nature of the crime that an individual is charged with. *Roberts* at 112. Whether the reasonable suspicion is based upon the specific facts or circumstances of an individual's arrest and incarceration, or upon the nature of the crime charged, the concept of contraband, apart from weapons and drugs, is significant. Plaintiff's proposed injunction fails to take this into account.

It is unquestioned that strip searches may be justified by the belief, whether individualized or based upon the nature of the crime charged, that an individual is concealing contraband other than weapons or drugs. *Wood v. Hancock County*, 354 F.3d 57 (1<sup>st</sup> Cir. 2003) (contact visits are a significant source of contraband in jails and . . . seemingly harmless items – such as pens and paper clips – can be transferred innocently and used in harmful ways). The *Wood* court cited two other cases for the proposition that contraband, other than weapons and drugs, may pose serious security risks in the correctional setting. *Block v. Rutherford*, 468 U.S. 576, 586 (1994) ([v]isitors can easily conceal guns, knives, drugs, *or other contraband* . . .); *Goff v. Nix*, 803 F.3d 358, 364-65 (8<sup>th</sup> Cir. 1986) (. . . weapons, drugs, *and other items of contraband* are serious problems in our nation's prisons).

The Defendants submit that the following is a correct statement of current First Circuit law with respect to strip searches of pretrial detainees: “strip searches may be conducted on any person charged with a crime involving weapons, drugs or other contraband, or violent felonies, and on any person for whom circumstances provide individualized reasonable suspicion that the person is concealing drugs, weapons or other contraband”. Stated in the negative, and in the form proposed by the Defendants' proposed injunction: “strip searches may not be conducted on any person who is not charged with a crime involving weapons, drugs, or contraband, or with a violent felony, unless there is a reasonable belief that that person is concealing drugs, weapons or

other contraband”. The Defendants submit that the language in their proposed injunctive Order accurately reflects the current state of the law in this circuit, and further submit that the language contained in Plaintiff’s proposed Order is too restrictive in that it prohibits strip searches under circumstances that are presently recognized as providing a constitutional basis for such searches.

**B. THE DEFENDANTS REQUEST THAT ANY INJUNCTIVE ORDER NOT ONLY ACCURATELY REFLECT THE CURRENT STATE OF THE LAW WITH RESPECT TO STRIP SEARCHES OF PRETRIAL DETAINEES, BUT THAT THE INJUNCTION BE FLEXIBLE SO THAT ITS TERMS ARE MODIFIED TO REFLECT THE EVOLUTION OF THE LAW WITH RESPECT TO THESE SEARCHES.**

The Defendants agree to conduct themselves within the bounds of the law<sup>4</sup>, but no more. The Defendants respectfully insist that any injunction be flexible, so as to evolve with developments in the law, and to be coterminous with the law.

There is substantial support for the proposition that, if a party to litigation agrees to refrain from conduct that is, or is believed to be, unconstitutional, and if it is subsequently determined that such conduct is in fact constitutional, the party may be nevertheless be held to that agreement:

If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, the party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking  
.....

*Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992). Here, as the Court and the Plaintiff are aware, the Defendants have long argued that both this Court and the First Circuit Court of Appeals (beginning with its decision in *Swain v. Spinney* in 1997) have failed to adhere

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<sup>4</sup> The Defendants have repeatedly asserted that their conduct has, at all times, both in policy and practice, conformed with constitutional requirements.

to the analytical paradigm established by the United States Supreme Court in cases where arrestees assert a violation of Fourth Amendment rights. *See, e.g., Defendants' Motion for Reconsideration*, Docket Item No. 150 ; *Defendants' Motion for Certification of Immediate Appeal*, Docket Item No. 258. If the Defendants were to agree to an Order requiring them to conduct themselves consistent with the state of the law as it exists today, and if that law were to change in the future, the Defendants could be foreclosed from seeking modification of the injunctive Order.<sup>5</sup> The Plaintiff's proposed injunctive Order, particularly if agreed to by the Defendants, would essentially foreclose the ability for modifications based upon changes in the law. Specifically, the words "are forever enjoined and restrained" appear to be intended to foreclose future modifications.<sup>6</sup> The Defendants' proposed injunctive Order does two things: (1) it specifically provides, by its terms, that the Order shall be deemed modified so that it remains consistent with the law as the law may evolve, and (2) to the extent there is disagreement in the future over whether and to what extent controlling Fourth Amendment law may have changed, such question shall be considered without regard to the standards of review set forth in *Rufo*.

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<sup>5</sup> Ironically, this eventuality would be a one way street. If the law were to become less restrictive with respect to strip searches, it is possible that the Defendants would nevertheless be required to hew to the terms of the more restrictive state of the law that exists at the present time. Contrariwise, if the law were to become more restrictive with respect to strip searches, Defendants would find no safe harbor in the terms of the injunctive Order, and would be obligated to conform their conduct to be consistent with the change in the law. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. at 388.

<sup>6</sup> It is noteworthy that the Defendants provided their proposed Order, and their explanation for the terms of that Order, *before* Plaintiff presented her proposed Order. It is apparent that the Plaintiff recognized the Defendants' desire to seek future modifications of the Order based upon changes in the law, and then specifically included language in their proposed Order that would foreclose such modifications.

### **III. CONCLUSION**

The Defendants do not agree that they consented, as part of the Settlement Agreement signed on September 29, 2006, to be bound to an injunctive Order. However, the Defendants will agree to the issuance of such an Oder, and have proposed an Order that they believe accurately states the substance of law in the First Circuit regarding strip searches of pretrial detainees at the present, and that permits for modifications of the Order in the future based upon changes in that law. The Defendants will only agree to the entry of an Order that meets both of those premises, and objects to the issuance of any Order that does not. The Defendants reserve the right to take an appeal from the issuance of an injunctive Order that does not meet both of those conditions, while at the same time complying with all agreed upon terms of the settlement reached in this case.

Dated: October 10, 2006

WHEELER & AREY, P.A.

By           /s/ Peter T. Marchesi            
Peter T. Marchesi, Esq.  
Attorney for Knox County Defendants  
P.O. Box 376  
Waterville, Maine 04903-0376

UNITED STATES DISTRICT COURT  
District of Maine

LAURIE TARDIFF )  
Plaintiff )  
 )  
v. )  
 ) Docket No. 02-251-PC  
KNOX COUNTY, DANIEL DAVEY, )  
JANE DOE and JOHN DOE, )  
Defendants )  
 )

**CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2006, I electronically filed with the Clerk of Court using the CM/ECF system Defendants' Memorandum of Law in Support of Proposed Injunctive Order. The Court will send notification of such filing(s) to the following:

SUMNER LIPMAN, ESQ.- slipman@lipmankatzmckee.com  
DALE THISTLE, ESQ.- dthistle@verizon.net  
ROBERT STOLT, ESQ.- rstolt@lipmankatzmckee.com  
JOHN WALL, ESQ. - jwall@monaghanleahy.com  
TOBY DILWORTH, ESQ. - tdilworth@lawmmc.com

Dated: October 10, 2006

/s/ Peter T. Marchesi  
Peter T. Marchesi, Esq.  
Wheeler & Arey, P.A.  
Attorney for Defendants  
27 Temple Street, P.O. Box 376  
Waterville, ME 04903-0376

cc: Malcolm Ulmer  
Timothy Woodcock, Esq.

**Beverly Pelletier**

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**From:** "Peter Marchesi" <pbear@wheelerlegal.com>  
**To:** "Beverly Pelletier" <bjp@wheelerlegal.com>  
**Sent:** Tuesday, October 10, 2006 11:57 AM  
**Attach:** injunctive order.DOC  
**Subject:** Fw: Proposed Injunctive Order

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----- Original Message -----

**From:** Peter Marchesi  
**To:** Woodcock, Tim ; 'Toby Dilworth' ; Peter Marchesi ; Malcolm Ulmer ; John Wall ; James D. Poliquin ; dale thistle ; Cassandra Shaffer ; Bob Stolt ; Sumner Lipman  
**Sent:** Friday, October 06, 2006 3:36 PM  
**Subject:** Proposed Injunctive Order

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Counsel, Please see the Proposed Injunctive Order of the Defendants. Our primary concerns are twofold:

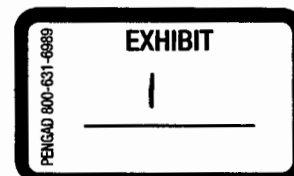
1. The Order require compliance with the current state of 4th Amendment law in the 1st Circuit (even if we or you disagree with it)at the time it is issued and as it evolves; and
2. the Order be modified by its terms to conform to developments in the law, and, to the extent modifications via Court Order are required, the *Rufo* defense based upon consent not apply.

Put simply, we want the Order to evolve with the law, and not be a snapshot in time.

Please respond.

Peter

2. the



10/10/2006



UNITED STATES DISTRICT COURT  
District of Maine

LAURIE TARDIFF, individually, and )  
on behalf of others similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. ) Civil No. 02-251-P-C  
 )  
KNOX COUNTY, et al., )  
 )  
Defendants. )

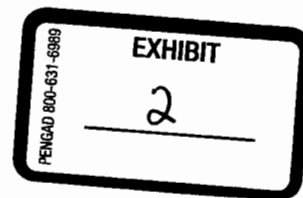
**ORDER OF PERMANENT INJUNCTION**

This Order of Permanent Injunction is entered by this Court as part of and in furtherance of the claims raised in Laurie Tardiff vs. Knox County, et al, Civil No. 02-251-P-C. This permanent injunction incorporates the Final Settlement Agreement signed by the parties and approved by this Court on October \_\_\_\_, 2006, all documents incorporated therein.

Wherefore, it is hereby ORDERED, that:

Knox County, its officials, officers, employees and others working in concert with them are forever enjoined and restrained from conducting or performing a strip search and/or visual body cavity search without evaluation for individualized reasonable suspicion on any individual being held at the Knox County Jail:

- (1) After having been arrested on charges that did not involve a weapon, drugs, or a violent felony; or



- (2) While waiting for bail to be set on charges that did not involve a weapon, drugs or a violent felony; or
- (3) While waiting for an initial court appearance on charges that did not involve a weapon, drugs, or a violent felony; or
- (4) Having been arrested on a default or other warrant that did not involve a weapon, drugs or a violent felony.

SO ORDERED

Dated this \_\_\_\_\_ day of October, 2006.

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Gene Carter,  
Judge, United States District  
Court

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

LAURIE TARDIFF, )

Plaintiff )

vs. )

Civil No. 02-251-P-C

KNOX COUNTY, et al., )

Defendants )

**ORDER OF INJUNCTION**

This Order of Injunction is entered by this Court as part of and in furtherance of the claims raised in *Laurie Tardiff vs. Knox County, et al.*, Civil No. 02-251-P-C. This injunction incorporates the Final Settlement Agreement signed by the Parties and approved by this Court as of October , 2006, all documents incorporated therein.

1. This Injunction is premised on the understanding that the Parties have agreed that the settlement of the claims raised in *Laurie Tardiff v. Knox County* embodies a compromise by all Parties in their respective positions; specifically, this Injunction is premised on the understanding that the Defendants have denied and continue to deny liability and that Defendants' denial is based, in part, on their view of the applicability *vel non* of Fourth Amendment<sup>1</sup> to strip searches as they may be conducted at various points in the "continuum from arrest to incarceration"<sup>2</sup>, and, in part, on their view of the particular policies, practices pertaining to strip searches of individuals at issue in

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<sup>1</sup> IV Amend., U.S. Const.

<sup>2</sup> *Illinois v. Lafayette*, 462 U.S. 640, 644 (1983).

the instant case, as well as specific strip searches of specific individuals at issue in this case violated Fourth Amendment privacy rights of those searched; this Injunction recognizes that Defendants' denial of liability on these issues and all others comprehended by *Tardiff v. Knox County, et al.*, was and remains an essential term for settlement of this case;

2. This injunction is further premised on the understanding that the Fourth Amendment claims raised in *Tardiff v. Knox County, et al.* are based on court interpretations of the Fourth Amendment and that, as such, Fourth Amendment may evolve and change based on court decisions issued after the effective date of this Injunction. It is the intent of the Parties and an essential premise of this Injunction that Defendants' obligations herein shall be coterminous with controlling authority on Fourth Amendment law governing as that authority may evolve and change after the effective date of this Injunction irrespective whether that authority is more or less restrictive of such searches than the authority in effect as of the date of this Injunction.
3. In the event that the Parties disagree over whether and to what extent controlling authority on Fourth Amendment law may have changed at any time after the effective date of this Injunction, such question shall be considered without regard to the standards of review set forth in *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992) or any other standard for the review of Injunctions, Consent Decrees or similar orders or agreements and the sole question shall be whether and to what extent controlling authority governing Fourth Amendment law has changed. Such determination shall be appealable by either party de novo as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED THAT,

1. Arrestees being held on misdemeanor charges may be strip searched as part of the booking process only if officers have reasonable suspicion that the arrestee possesses weapon or weapons, controlled substances, or contraband.
2. Arrestees being held on felony charges may be strip searched as part of the booking process only if (a) the charge involves violence, weapons or controlled substances or (b) the officers have reasonable suspicion that the arrestee possesses a weapon or weapons, controlled substances or contraband.
3. The Parties, individually and collectively, retain the right to seek a modification of this Injunction to conform with any changes in controlling authority governing the circumstances under which strip searches may or may not be conducted and the standards applicable to such determinations.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Gene Carter, Senior United States  
District Court Judge