COUNTY OF LOS ANGELES
OFFICE OF INSPECTOR GENERAL

ANALYSIS OF THE LEGAL BASIS FOR X-RAY BODY SCANNER SEARCHES IN COUNTY JAIL FACILITIES

November 21, 2014

by
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INTRODUCTION

On October 21, 2014, the Board of Supervisors requested the Office of Inspector General to report "on the legality of the Los Angeles Sheriff's Department use of body scanners to conduct inmate searches in jail facilities to limit liability for use of force incidents due to body searches." As a result of the request, the Inspector General initiated a review of the Custody Services Division's pilot program which evaluated the use of x-ray technology-based scanners at the Inmate Reception Center from April 21, 2014, through August 27, 2014. The review addressed two specific questions: (1) the legal basis for the use of body scanner technology versus other means of searching prisoners[1] for contraband and (2) whether Custody Services Division can legally compel or use force to bring about submission – or if the alternatives already available are sufficient to maintain facility security.

Our analysis concludes that the Sheriff is on solid legal footing using the x-ray scanner technology in jail facilities to search prisoners for contraband. At this point, whether a prisoner can be legally compelled to submit to such a scanner search when other means of searching for contraband are available has not been the subject of any published review in California state courts or within the federal United States Courts for the Ninth Circuit. Our review of the pilot project did not uncover any uses of force which occurred as a result of a prisoner refusing to submit to a body scan. In instances where prisoners did refuse a scan, alternative procedures took place which kept the facility, its personnel and prisoners secure.

BACKGROUND

The 2012 *Report of the Citizen's Commission on Jail Violence* highlighted concerns that LASD personnel were using strip searches to "intentionally humiliate inmates."[2] The Commission noted that other large jurisdictions, such as Chicago and New York, had introduced body scanners to "substantially reduce (and even largely eliminate) the need for strip searches." The LASD had already been exploring utilizing x-ray body scanner technology in the place of strip searches. The CCJV recommended that the Board of Supervisors "should provide funding so that the Department can purchase additional body scanners."[3] As a result, the Board of Supervisors approved funding to install such scanners.

The LASD launched a pilot program on April 21, 2014, in the Inmate Reception Center (IRC) at two locations – "booking front," where prisoners are initially processed into Los Angeles County jail facilities and the "court line," for prisoners returning from court appearances. The pilot ran through August 27, 2014. According to documents reviewed by OIG, the LASD's goal for using

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[1] The term "prisoner" used in OIG publications is synonymous with "inmate" or "detained person." Where there is any distinction between those terms, such as the application of the Eighth Amendment to "post-conviction prisoners," the Fourteenth Amendment Due Process Clause's application to "pre-trial detainees," or the State's Title 15 Minimum Standards for Local Detention Facilities use of the term "inmate," we will designate accordingly.

[2] Citizen's Commission on Jail Violence, *Report of the Citizen's Commission on Jail* Violence (Sep. 2012), pp. 42-43.

[3] Ibid, Recommendation: 3.12, pp. 58-59.

scanners "is to curtail the supply of contraband entering custody facilities and to provide additional privacy during intake and routine searches."[4]

Shortly after the pilot program launched, there were a significant number of refusals by prisoners affiliated with the Latino gang network known as the "Southsiders" as the result of a purported order to refuse to submit to the scanner. OIG interviewed LASD personnel and managers and reviewed documents provided by the LASD. According to the LASD's data, 16,231 prisoners went through the scanners during the pilot period. The Department-reported average daily refusal rate was 3.28% - almost exclusively at the court line since new incoming prisoners would not have been familiar with the Southsider's edict. Most of those refusals were during the first initial weeks of the pilot program. Records provided by LASD Custody Services Division to OIG detailed "unusual occurrences" which took place between May 1 and May 8, 2014. During the time period, 25 prisoners refused to go through the scanner because, according to the prisoners, they were "following orders." One other prisoner, a Native American, refused on "cultural grounds." Thus, there were 26 refusals in total during the first week of May.

As the pilot program progressed, refusals because of gang orders became negligible according to LASD records reviewed and personnel interviewed by OIG staff. OIG staff, for example, reviewed records for three separate days. On May 28, 2014, there were five reported refusals. On June 5, 2014, there were two refusals and on June 17, 2014, there were five refusals. Each of these 12 refusals purportedly was because the individual prisoner asserted he was "afraid of radiation."

Custody Services Division issued a directive dated two days after the pilot screening program launched addressing the refusal procedure. Felony prisoners, regardless of whether arraigned, who "decline the opportunity to be screened shall be separated and a Sergeant shall be requested." Once a Sergeant is present, "inmates who decline the opportunity to be screened shall be given a visual body cavity search.[5] Inmates who refuse to submit to a visual body cavity search are subject to 'major violation' disciplinary procedures."

Pre-arraigned misdemeanor and infraction prisoners, according to the directive, "shall not be subjected to a visual body cavity search based upon refusal alone." The refusal shall not be the basis for "individualized and articulable" facts justifying a visual body cavity search. If there is individualized suspicion that a pre-arraignment misdemeanor or infraction arrestee is in possession of contraband, a visual body cavity search can only occur "with approval from the watch commander."

The boycott by Southsider gang members did not prevent the LASD from using the traditional visual body cavity search as an alternative to the body scanner. For example, on May 8, 2014, an prisoner returning from court refused to go through the scanner. During the subsequent search,

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[4] When a prisoner enters a jail facility, for the first time or from court, the intake process includes a search of their clothing and belongings as well as a search of their person. This includes a visual inspection of whether the individual has secreted contraband in a body cavity. Scanner searches take the place of the visual inspection.

[5] Per the LASD Custody Division Manual, a "strip search" is that "which requires a person to remove or re-arrange some or all of their clothing to permit a visual inspection of the underclothing, breasts, buttocks or genitalia." A "visual body cavity search" is the "visual inspection of a person's body cavities." These definitions are taken from Cal. Penal Code § 4030 which regulates strip searches of misdemeanor and infraction detainees in California detention facilities.

deputies discovered a baggie of tobacco hidden in his buttocks. The LASD was not aware of any instances where a prisoner refused both the scanner and the visual body cavity search. Moreover, according to the LASD there was one use of force within the scanner area. The incident was not the result of the prisoner refusing to go through the scanner but because the scanner operator spotted contraband and the prisoner then became resistive during the subsequent inquiry.

LEGAL ANALYSIS

The Legal Basis for Using Body Scanners in Custody

The United States Supreme Court recently provided significant guidance to local jail authorities regarding the ability to search incoming detainees for contraband. (*Florence v. Board of Chosen Freeholders* (2012) 566 U.S. __ [132 S.Ct. 1510, 182 L.Ed.2d 566].) The decision emphasized that "maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." (*Id.* at pp. 1513.) As such, "a regulation impinging on an inmate's constitutional rights must be upheld 'if it is reasonably related to legitimate penological interests.'" (*Id.*, at p. 1515, quoting *Turner v. Safley* (1987) 482 U.S. 78, 89 [107 S.Ct. 2254, 90 L.Ed.2d 64].) The Supreme Court reaffirmed the standard from its prior ruling where it upheld a Los Angeles County Jail ban "on all contact visits because of the threat they posed." (*Ibid*, see *Block v. Rutherford* (1984) 468 U.S. [104 S.Ct. 3227, 82 L.Ed.2d 135].)

"Correction officials have a significant interest in conducting a thorough search as a standard part of the intake process." As a result of recognizing that interest, the Supreme Court held that a strip search procedure in New Jersey where all detainees introduced into the general population were subjected to a strip search regardless of whether the detainee was arrested for a felony or a misdemeanor did not violate the Fourth Amendment of the United States Constitution. (*Florence v. Board of Chosen Freeholders, supra,* 566 U.S. __ [132 S.Ct. 1510, 1517, 182 L.Ed.2d 566, 577].) The Court found that the strip search policy was reasonably related to the legitimate interests of maintaining a safe facility. Applying the Supreme Court's reasoning in *Florence*, it is very likely that the use of an x-ray scanner for the same purpose as strip searches – without the added lack of privacy or humiliation aspects – will pass Fourth Amendment scrutiny.

The more specific question of whether the use of a full-body x-ray scanner to search for prisoner contraband violates the civil rights of prisoners has only recently been subjected to court review. Two prisoners at the Anna M. Kross Center (AMKC) on Rikers Island in New York City brought separate 42 U.S.C. § 1983 actions asserting that they were subject to an unreasonable health hazard by being forced to submit to a scan on multiple occasions. (*Rahman v. Schriro* (S.D.N.Y. May 27, 2014, No. 13-CV-6095) 2014 U.S. Dist. LEXIS 72055; *Middleton v. City of New York (In re RadPro SecurPass Scanner Cases)* (S.D.N.Y. August 13, 2014, No. 13-CV 8441) 2014 U.S. Dist. LEXIS 113616.) Both plaintiffs were convicted prisoners, thus their claims were analyzed under the Eighth Amendment's proscription of cruel and unusual punishment:

> [A] pretrial detainee held in state custody receives protection against dangerous prison conditions under the Due Process Clause of the Fourteenth Amendment [citation]. While Plaintiff does not allege whether he was incarcerated at AMKC as a pretrial detainee or as a convicted prisoner, the standards for establishing a constitutional violation under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment are identical in this context [citation]. (*Middleton v. City of New York, supra,* 2014 U.S. Dist. LEXIS 113616.)

The court in *Middleton* ruled that the proper standard to determine the constitutionality of using the scanner was whether "the risk is so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." (*Ibid.*)

The RadPro SecurPass device discussed in *Middleton* has an adjustable setting and can emit up to 1.25 millirem of radiation during one scan. The court in *Middleton* found even at the high dose, the radiation to which an inmate is exposed is the equivalent of less than a two-hour plane flight or "a day-and-a-half of ordinary living." (*Ibid.*) After making those findings, the court rejected the plaintiffs' claims and granted the motion to dismiss on the grounds that they were not subject to any potential harm.[6]

The device used by the LASD emits far less radiation than the SecurPass. The LASD purchased Smiths Detection B-Scan 16HR-LD 250. That particular model emits "less than" 0.025 millirem – which is one-fiftieth of the amount of the SecurPass radiation.[7] While the *Middleton* and *Rahman* cases were in a different jurisdiction, it is unlikely that a court will find that the use of the B-Scan device will be found to constitute a dangerous condition that violates the due process of inmates.[8] In fact, the Smiths Detection device's published radiation emission of less than 0.025 millirem is consistent with the standards established by the United States Food and Drug Administration (FDA) for general-use x-ray security screening systems. According to the FDA's *Products for Security Screening of People* publication, "a person would have to be screened more than a thousand times in one year in order to exceed the annual radiation dose limit for people screening that has been set by expert radiation safety organizations."

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[6] The same judge presided in *Rahman* and partially granted the motion to dismiss but also ordered a period of 60 days for limited discovery on the issue of whether the higher radiation emitted by the SecurPass did rise to the level of plaintiff's claim that he was "regularly exposed to unsafe levels of radiation."

[7] Smiths Detection, *Technical Information, B-SCAN 16HR-LD 250* (May 21, 2014) <http://www.smithsdetection.com/index.php?option=com_scio&task=downloadProductPdf&assetId=11813&productName=B-SCAN 16HR-LD 250>

[8] According to fact gathering by the court in *Middleton*, average radiation dose per person in the United States is 620 millirem. About 27 millirem comes from cosmic radiation and 200 millirem comes from radon in the home. (See also, U.S. Food and Drug Administration, *Products for Security Screening of People* (last updated June 17, 2014) <http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/SecuritySystems/ucm227201.htm> [as of Nov. 17, 2014].)

Using Force to Effectuate a Body Scan

In developing the pilot program, the LASD intentionally did not make refusal to submit to a scan a violation of the prisoner discipline rules. According to *Middleton* and *Rahman*, at AMKC on Rikers Island failure to submit to a scan is a rules violation. Given the broad leeway jail authorities are given to establish regulations within facilities, it appears that the LASD could institute a similar policy to force compliance if and when it uses body scanners as a primary screening tool.

As an additional note, there is the question of whether physical force can be used to effectuate an x-ray body scan. While there is no case law on this very question, other instances of using force to overcome a refusal to cooperate with jail procedure have had mixed results. "Force used without legitimate purpose is unreasonable *per se*." (*Bates v. Arata* (N.D. Cal. March 26, 2008, No. C 05-3383 SI) 2008 U.S. Dist. LEXIS 23910 (see *Fontana v. Haskin* (9th Cir. 2001) 262 F.3d 871, 881).) Whether force used is reasonable is determined by whether the "officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." (*Graham v. Connor* (1989) 490 U.S. 386, 397 [109 S.Ct. 1865, 150 L.Ed.2d 443].) "In evaluating the government's interest in the use of force we look to: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by light." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163.)

Applying those standards to the custodial setting is very fact specific. In *Bates v. Arata, supra,* plaintiffs were political activists who were arrested as a group during a protest in San Francisco. They brought suit alleging that they were subjected to unreasonable force when custodial officers used pain compliance force to overcome the plaintiffs' resistance to leaving holding cells and fingerprinting. The court found "there is no dispute that the officers used force for the legitimate purpose of extricating plaintiffs from the holding cells and compelling plaintiffs to comply with booking procedures. Because the officers used force towards obtaining the legitimate purpose of booking plaintiffs, the Court finds that the force applied was not unreasonable per se." (*Bates v. Arata, supra,* 2008 U.S. Dist. LEXIS 23910.) As applied in the particular instances before that court, it found the force reasonable in that the plaintiffs were actively obstructing the booking process by linking arms with each other, holding onto fixed objects when being removed from holding cells and by clenching their hands rather than allowing themselves to be fingerprinted.

In contrast, though, in 1991 the Ninth Circuit Court of Appeals upheld compensatory damages against Newport Beach City where force was used to extract a blood sample from a DUI suspect. The court pointed out that "force had been applied but before the blood was actually extracted, Hammer had agreed to submit to a Breathalyzer test." That consent "may very well have reduced to insignificance the need to extract Hammer's blood." (*Hammer v. Gross* (9th Cir. 1991) 932 F.2d 842, 845-846.)

In practicality though, the question of using force to compel an prisoner to submit to a body scan may never be germane. As long as the LASD has an alternative means of detecting whether an incoming prisoner is carrying contraband by conducting a strip search, isolating and monitoring the prisoner, or by obtaining a search warrant to conduct a medical x-ray when there is probable cause to believe there is contraband, force will remain an unlikely option.

REMAINING ISSUES

In preparing the review of these relatively narrow questions in a limited time frame, OIG gathered documents, interviewed LASD personnel and observed the scanner system in action at IRC. As a result, we became aware of a number of issues that will require a more in-depth review and analysis:

- We believe that the records maintained during the pilot project require greater scrutiny regarding how many prisoners were scanned, how many prisoners actually refused to submit to a scanner search and for what reason, and how often contraband was recovered. We are concerned that the records we reviewed were incomplete. Understanding to what extent the 3.28% refusal rate was skewed by the purported large number of refusals during the initial few weeks of the program is essential.
- We are concerned that the maintenance of the scanners is proving to be difficult. We learned during this review that one of the scanners in IRC was damaged by water in mid-September. That scanner is still not operational as the LASD waits for the delivery of the correct parts after the vendor initially sent the wrong parts to a location belonging to a different agency.
- As previously discussed elsewhere, LASD staffing issues appear to be a significant stumbling block to effectively utilizing the body scanner. Efficient operation requires five deputies on each shift and those positions have not been allocated.
- Based on our observation, we suspect that the LASD could benefit from a more robust training regime for its operators. The eight-hour course may be insufficient to prepare deputies to effectively fulfill the critical duty of discerning an X-ray image in a limited period of time.

Date: November 21, 2014

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