



## CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

256 SOUTH OCCIDENTAL BOULEVARD

LOS ANGELES, CA 90057

Telephone: (213) 388-8693

Facsimile: (213) 386-9484

[www.centerforhumanrights.org](http://www.centerforhumanrights.org)

September 23, 2014

California Department of Corrections and Rehabilitation  
Attn: Gail Long

Office of Administrative Law  
Attn: OAL Reference Attorney

*Via email to [gail.long@cdcr.ca.gov](mailto:gail.long@cdcr.ca.gov), [staff@oal.ca.gov](mailto:staff@oal.ca.gov) and fax to (916) 324-6075*

Re: Notice of Emergency Proposed Regulations, No. 2014-0918-01EON - Canine Searches of All Individuals; No. 2014-0912-03EON - Electronic Drug Detection Equipment

Dear Ms. Long and OAL Reference Attorney:

The Center for Human Rights and Constitutional Law (Center) submits the following comments regarding the above referenced notice of change to regulations, which proposes to amend, *inter alia*, the Department's Rules and Regulations of Adult Operations and Programs to subject visitors to state prisons to unreasonable strip searches, potentially resulting in devastating loss of outside support for incarcerated people in California's state prisons.

The Center is a non-profit, public interest legal services organization dedicated to furthering the constitutional and human rights of the indigent. The Center is broadly recognized for its expertise in constitutional law and international law of human rights. From time to time, the Center comments on proposed rulemaking where a governmental agency's proposed rules raise a substantial likelihood that indigent persons' rights under international law or domestic constitutions will be violated.

### Statement of general concern.

The Center acknowledges the Department's interest in institutional security and a drug/contraband-free environment. However, we see an irreconcilable conflict between these interests and inmates' and visitors' Constitutional rights. The proposed regulations will actually have a counter-productive effect by discouraging inmate visitations. Additionally, we find the Department's decision to allow only 5 days for public comment as grossly insufficient and inconsiderate to the general public and inmates' families and friends who will be most affected by the proposed regulations.

We have carefully reviewed the Department's proposal and have concluded that the proposed regulations are problematic on the following grounds:

**1. The proposed canine, ion scanner, and strip searches of visitors constitute unreasonable searches and seizures in violation of the 4<sup>th</sup> Amendment and 1<sup>st</sup> Amendment**

The proposed regulations enforce the use of canines and ion scanners on people who are visiting state prisons for contact visits with their loved ones. Under the new regulations, "any person" visiting is "subject to search." See *Proposed Subsections* 3173.2(c)(1). If the canine does alert during an air scan search of the visitor "the visitor shall be required to submit to an unclothed body search as a condition of visiting. Refusal to submit to the search shall result in the denial of contact visiting for that day..." *Proposed Subsections* 3173.2(c)(3)(B). In instances when "a positive canine alert is given but no drugs or contraband are discovered or in instances where drug paraphernalia is discovered on the person of a visitor the visitor shall be required to submit to an unclothed body search as a condition of visiting..." *Proposed Subsections* 3173.2(c)(3)(F).

Under the Fourth Amendment, every search or seizure by a government agent must be reasonable. U.S. Const. amend. IV. Strip searches deeply intrude upon an individual's privacy interest.<sup>1</sup> To perform a strip search, government officials must usually possess a search warrant and demonstrate that there is a clear indication that they will find evidence.<sup>2</sup> When prisoners' family members and friends visit prisons, they often expect to submit to some routine searches, such as pat downs and metal detectors. However, the proposed regulations expand the scope of the warrantless searches required for entry into prisons beyond what is reasonable because they impose such a personal intrusion upon free citizens who are merely visitors to the institution. The ultimate intrusion, the strip search, cannot be conducted at will upon prison visitors and is not justified by the Department's interests involved. The Department has not demonstrated that its efforts at prevention and detention of contraband would be seriously hampered if the use of canines, scanners, and strip searches were not to be implemented. It has not even demonstrated that there is an immediate need or extraordinary circumstance warranting these extreme measures.

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<sup>1</sup> *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982); accord *Daugherty*, 33 F.3d at 556-57 (recognizing strip search as embarrassing and humiliating experience, even if conducted in professional and courteous manner); *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir. 1981) (en banc) (observing that strip, body cavity, or stomach searches embarrass person involved); *United States v. Dorsey*, 641 F.2d 1213, 1217 (7th Cir. 1981) (declaring that indignities and invasions of privacy attending strip searches are self-evident); *Tinetti v. Wittke*, 479 F. Supp. 486, 491 (E.D. Wis. 1979) ("[Searches including] the visual inspection of the anal and genital areas, ha[ve] been characterized by various witnesses here, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission."); cf. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) (recognizing that even limited search of outer clothing for weapons is likely to be annoying, frightening, and perhaps humiliating experience).

<sup>2</sup> See *Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (holding that Fourth Amendment forbids intrusions beyond body's surface on "mere chance that desired evidence might be obtained.")

Also, the regulations provide that “Any visitor who refuses to be searched in this manner shall be denied contact visiting...” *Proposed Subsections* 3173.2(c)(2)(B). This provision infringes upon visitors’ First Amendment associational rights because visitations would be predicated upon an unreasonable search and seizure. Clearly prison authorities have the duty and responsibility of maintaining order and of prohibiting the smuggling of drugs and other contraband into the Department, but they may not at will conduct such intrusive searches upon the bodies of visitors to the prisons nor condition visitation upon consent to such searches. The use of strip searches is highly intrusive and should be used only in very limited circumstances, where there is reliable criteria that supports the credibility of these methods.

## **2. There is a high rate of error in the reliability of canine searches and ion scanners, making their use here unjustified**

Most critically, canine searches and ion scanners are shown to be so lacking in reliability that they could not justify the degree of intrusion which is involved in a strip search of a visitor. A 2011 analysis of three years of data for suburban police departments found that only 44 percent of those alerts by the dogs led to the discovery of drugs or paraphernalia in drivers’ cars.<sup>3</sup> For Hispanic drivers, the success rate was just 27 percent. Experts point to inconsistent training standards, lack of certification for canine trainers, and mistakes on the part of handlers. A 2011 UC Davis study found that “the performance of drug- and explosives-sniffing dog/handler teams is affected by human handlers’ beliefs, possibly in response to subtle, unintentional handler cues.”<sup>4</sup>

A study showed that one drawback of ion scanner technology is that it measures drug particulates down to the nanogram, identifying “false positives frequently.”<sup>5</sup> In examining the practical reliability of detection by ion scanner units in a laboratory and prison setting, one study found that cocaine was the only drug that was reliably detected, while heroin and amphetamine were poorly detected.<sup>6</sup> The research, development, and evaluation agency of the U.S. Department of Justice issued a report evaluating contraband drug detectors for law enforcement purposes cautioning the limitations of the technology.<sup>7</sup> First, ion scanners detect chemicals that are derived from the building blocks of many substances other than controlled substances. In particular, the Department of Justice reported that the technology cannot distinguish between two different substances that are composed of ions with similar size and mass. This means that even an innocuous substance can be identified as illegal contraband. Such an event is called a “false

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<sup>3</sup> *Chicago Tribune*: [http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105\\_1\\_drug-sniffing-dogs-alex-rothacker-drug-dog](http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog) (last visited September 23, 2014).

<sup>4</sup> Lisa Lit, Julie B. Schweitzer, Anita M. Oberbauer, *Anim Cogn.* 2011 May; 14(3): 387–394. Published online 2011 January 12. doi: 10.1007/s10071-010-0373-2

<sup>5</sup> SCA Inc. (2001, October 1). Mailroom Scenario Evaluation Plan. Retrieved from: <http://www.ncjrs.gov/pdffiles1/nij/grants/199048.pdf>

<sup>6</sup> Sheldon, T.; Smith, G.; Doherty, S.; Waddell, R.; Donnelly, T. & Parker, A. (1998). Detection of Concealed Drugs on Prison Visitors: Realistic Laboratory and Field Trials of Six Drugs Trace Detectors and Passive Dogs. Proceedings of the 32nd Annual International Carnahan Conference on Security Technology, October 12-14, 1998, pp. 234-237.

<sup>7</sup> US Department of Justice. (2000). Guide for the Selection of Drug Detectors for Law Enforcement Applications (NIJ Guide 601-00)

positive” and to date, there are a number of substances that can cause this result, including medicine and painkillers, perfumes, body lotions, poppy seeds, and chlorine baby wipes. Second, innocent, inadvertent contact with drugs is frequent and widely acknowledged. For example, numerous scientific studies have shown that drug residue is commonly found on currency. In particular, cocaine attaches to bills, which in turn contaminates other materials with which it comes in contact. Third, the machines themselves can become contaminated from residues left in the equipment from prior scans. Indeed, extremely small amounts yield a positive signal.

The Department’s implementation of canine sniffs and ion scanner technology will result in innocent visitors being denied visitation wrongly, unfairly, and unnecessarily. Further, the Department cites to no research or data that shows its proposed measures will be effective in reducing drug/contraband smuggling into state prisons. It assumes that visitors are the source of such contraband but provides no evidence to justify these assumptions.

### **3. The proposed strip searches are not implemented fairly, they violate the dignity and privacy of visitors**

The Department should not use the fact that a visitor declines a strip search against that visitor. In a many cases, visitors may decline to be strip searched out of concern for their privacy and dignity, having nothing to do with concealing contraband or drugs.

Department employees, contractors, and volunteers are not subject to the strip searches, even if canines and scanners signal the presence of contraband, yet nothing is found on a pat-down search. Meanwhile, visitors including family members, friends, and loved ones are subject to the humiliating strip search in the same situation. Why is the Department holding employees and contractors to a different standard once a positive signal is found as opposed to other visitors? We find this distinctions in the proposed regulations to be irrational and unfair.

### **4. The Department must provide the public with sufficient time to comment**

In its “Finding of Emergency,” the Department does not state why the implementation of canine and ion scanner searches is an urgent matter and does not provide any examples that may warrant the emergency implementation of these regulations. By seeking emergency implementation of the regulations, the Department has circumnavigated the right of advocates, families, and friends to weight in and provide input, which is unacceptable. We request that the Department provide the public with at least thirty (30) days notice for an opportunity to comment on the proposed regulations and engage in a meaningful discourse.

## **RECOMMENDATIONS**

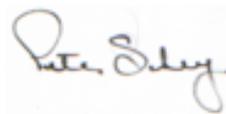
- 1) **Completely revoke these proposed new regulations:** We recommend that the Department revoke implementation of these regulations because they infringe in visitor’s constitutional rights, they are humiliating, overly intrusive and unnecessary.

- 2) **Give the public at least 30 days response time for all regulations.** The Department must give the public a respectful amount of time (at least 30 days) to respond to major changes in regulations, particularly those with such a huge impact on basic human rights.

If CDCR insists on using dogs and ION scanners to justify an invasion of privacy and violation of human rights, it is imperative that the following also be added and strictly enforced:

- **Decommissioning any canine or handler with over three false positives:**  
(Under 2014-0918-01EON): For each individual animal and each individual handler, records must be kept of each false positive alert. After three documented false positive alerts on visitors, employees, contractors or inmates, or on any combination thereof, that animal or handler must be decommissioned and banned from further use in this operation.
- **Decommissioning any scanner with over three false positives:**  
(Under 2014-0912-03E): For each individual ION scanner and each officer using the device, records must be kept of each false positive alert. After three documented false positive alerts on visitors, employees, contractors or inmates, or on any combination thereof, that ION scanner and officer must be decommissioned and banned from further use in this operation.
- **Search subjects must have the right, and be informed of the right, to have a witness to the search:** If unclothed body searches are to be conducted, the subject of the search must have the right and be informed of that right, to bring a witness to guard against false accusations, sexual misconduct by officers, or other misconduct by officers who might see an advantage in planting evidence. The consequences for the visitor of such misconduct on the part of an officer are too grave to do otherwise.  
Thank you for considering our concerns and suggestions.

Sincerely,



Peter Schey  
President and Executive Director



Carlos Holguin  
General Counsel