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IN THE FEDERAL DISTRICT COURT
DISTRICT OF WYOMING

ALFREDO SANCHEZ, DAVID CHRISTROPHER ("CHRIS") BALL, and SEAN MARX, **Plaintiffs,** **v.** **BRIDGET HILL, WYOMING ATTORNEY GENERAL, et al.,** **Defendants.**	**Civil Case Number:** **22-cv-47-SWS**

PLAINTIFFS' REPLY TO DEFENDANTS CARR, COMMISSION, AND DEPUTIES RESPONSE (DOC. 18) OPPOSING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants' response brief shows a fundamental misunderstanding of the issues in this case. For instance, defendants claim that Wyoming federal judges will be unable to use the U.S. Probation Office to administer drug and alcohol testing as a condition of federal pretrial release[1] if the 24/7 Program is enjoined. Such concerns are completely unfounded. The Bail Reform Act and U.S. Probation Office operate under fundamentally different statutory authority and use different implementation methods than the unconstitutional 24/7 Program. Even if the 24/7 Program is enjoined to pretrial participants, Wyoming judges, state and federal alike, have at their disposal a large multitude of bail options, that presumably comport with constitutional requirements, to serve the purpose of bail in Wyoming: to reasonably assure the appearance of an accused in court under the least restrictive conditions,[2] that will keep the community safe.

Defendants' arguments concerning the Fourth Amendment are similarly misplaced. First, defendants do not dispute the fact that the program is a crime prevention program.[3] However, they ask the Court to ignore the stated purpose of the statute and instead advance post-hoc, secondary, and theoretical purposes of the program. Additionally, defendants ignore the fact that consent was not possible in this case because plaintiffs were ordered by a judge to participate in the 24/7 Program.

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[1] Carr Brief, Doc. 18 p. 9, 12.

[2] Miller v. State, 560 P.2d 739, 742 (Wyo. 1977).

[3] Carr Brief, Doc. 18 p. 3.

Equally unpersuasive is the claim that deputies directly witnessed a criminal offense or had probable cause under Wyoming Statute § 7-2-1709 to arrest plaintiffs for contempt. By advancing this argument, defendants seek to usurp the Court's inherent authority to ensure compliance with its orders and delegate that authority to law enforcement officials in a manner which directly contradicts Wyoming Rule of Criminal Procedure Rule 42. And, in contrast to defendants' arguments, Wyoming Statute § 7-13-1709 is clearly void for vagueness as demonstrated by the fact that the sheriff's departments of Teton, Fremont, and Campbell Counties all interpret and enforce this law in different ways.[4]

ARGUMENT

1. Defendants Fail to Meet Their Burden of Proof for Their Defenses.

Contrary to the defendants' assertions that the repeated searches of pretrial participants met a special need and were conducted with consent, neither of these defenses has been established sufficiently by defendants to demonstrate plaintiffs are not likely to succeed on the merits.

A. Post-hoc secondary purposes of the 24/7 Program fail the special needs test.

The Program's primary purpose is indistinguishable from general crime control which generally will never serve as a special need.[5] Here, deputies conduct the testing, receive phone calls from those who are ordered to call daily for random drug screens,

[4] It is not clear if defendants are challenging plaintiffs' standing to file suit. Their brief states once that it is "not clear" whether plaintiffs have standing. Carr Brief, Doc. 18 p.p. 10-11. Plaintiffs maintain they have standing and reply to this argument in detail in their reply brief to Doc. 20.

[5] Ferguson v. City of Charleston, 532 U.S. 67, 68-69 (2001) (Special needs must be divorced from the state's general law enforcement interest.).

determine violations based on subjective judgment, arrest and punish participants who are late to testing or fail to call in daily, and cite contempt of court or charge new criminal violations resulting from the compelled contact between participants and deputies. Law enforcement is intimately involved at each and every stage of the 24/7 Program, including the voluntary decision of whether to even implement the program in their county.[6] Defendants' argument is so weak on this point that they go so far as to instruct the Court to ignore the statute's stated purpose of reducing crime.[7]

Defendants have also not proven the Program's statutes are narrowly drawn to serve secondary post-hoc reasons like bail enforcement, reduced DUI's, or highway safety; nor do they offer any evidence that these justifications are true purposes of the Program. First, defendants concede that there is no proof that reductions in DUI's in Wyoming between 2013 and 2019 can be attributed to the Program.[8] Additionally, the statistics defendants do offer in no way relate to repeat crimes committed by persons on pretrial release due to drug and alcohol abuse or relate to how many people violate their bond conditions by consuming drugs and alcohol.[9] Program statistics from other states prove nothing in this case because their statutes are worded differently and the programmatic purposes and implementation of the programs are different.[10]

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[6] W.S. § 7-13-1704 ("Each county, through its sheriff, may take part in the program.").

[7] Carr Brief Doc. 18 p. 14 ("Despite the stated purpose of the statute, . . .").

[8] Carr Brief, Doc. 18 p. 11. McLane Decl. ¶¶ 17-35.

[9] Id.

[10] Montana's stated purpose of its 24/7 Sobriety Program Act is "to protect the public health and welfare by reducing the number of people on Montana's highways who drive under the influence of alcohol or dangerous drugs; and to strengthen the pretrial and posttrial options available to prosecutors and judges in responding to repeat DUI offenders." Section 44–4–1202, MCA. It also only applies to second and subsequent drunk drivers and the statutes were "narrowly designed to test only arrestees who have a prior record of drunk driving offenses…." State v. Spady, 354 P.3d 590, 598 (Mont. 2015).

Finally, defendants' reliance on King is misplaced. In King, probable cause existed for the arrest of King for a serious crime for which King was booked and being jailed when DNA testing without a warrant was held reasonable.[11] The Supreme Court did not, however, hold that if King was released on bail that ongoing, continuous, searches of breath, saliva, urine or sweat, without either probable cause or a warrant were reasonable. In short, defendants have not overcome the presumption that the 24/7 Program serves the state's general law enforcement interest as evidenced by the "extensive involvement of law enforcement at every stage of the policy" and, as such, the Program does not meet the special needs exception.[12]

B. Consent is not voluntary because pretrial participants are already court ordered to enroll in the 24/7 Program as a bond condition before they sign the Participation Agreement.

Defendants have not credibly proven that pretrial participants' "enrollment in the program is a choice," or that pretrial participants "[k]nowingly and [v]oluntarily [c]onsented to the [s]earches and [s]eizures…"[13] The bond orders clearly include a condition to enroll in the 24/7 Program prior to release from jail.[14] There was no consent or even an option *not* to enroll as defendants suggest.[15] The agreement plaintiffs signed was compelled, mandatory, and advisory in nature. It states, "you have been ordered to enroll in the 24/7 Program." It also states the words "I

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[11] Carr Brief Doc. 18 p. 6 citing Maryland v. King, 569 U.S. 435 (2013)

[12] Ferguson at 68-69 (2001)(Special needs must be divorced from the state's general law enforcement interest.).

[13] Carr Brief, Doc. 18 p. 12.

[14] Ball Release Order Doc. 3-1. Sanchez Appearance Bond, Doc. 3-2. Marx Declaration, Ex. 2, Appearance Bond.

[15] Carr Brief Doc. 18 p. 12.

understand" in 11 separate locations in the agreement signaling the person acknowledges the program requirements. But, nowhere does it state the participant is agreeing freely, voluntarily to participate and has a right to refuse.[16] The only consent given is to the release of testing result information.

Defendants' reliance on the Maine case, Ullring,[17] or the California case, York, lends no support to the consent issue here because both cases found the searches were "reasonable" under the Fourth Amendment; here, the searches are twice daily, intrusive, without probable cause, occur over the course of several weeks and months and do not serve either the stated purposes of the 24/7 Program or its secondary purposes. Defendants' claims that pretrial participants consented to the Program's "searches and seizures" by signing the participation agreement is not proven and, at most, any consent provided was involuntary because the searches were unreasonable.

2. Rule 42 Does Not Provide Probable Cause for Warrantless Arrests Because It Expressly Requires Officers to Seek a Warrant by Affidavit.

Defendants' claims that deputies have probable cause to arrest all participants for being late to testing without complying with Rule 42 are incorrect. The Tenth Circuit in McCarty held probable cause for indirect contempt may exist when officers "prepared the appropriate affidavit and presented it to a detached and neutral

[16] Ball Participation Agreement Doc. 3-1. Sanchez Participation Agreement Doc. 20-5. Marx Declaration, Ex. , Participation Agreement.

[17] Carr Brief Doc. 18 p. 13 citing State v. Ullring, 741 A.2d 1065, 1068 (Me. 1999) ("if the bail condition in question is unauthorized or unconstitutional, it cannot form the basis for the consent."), In re York, 892 P.2d 8014, 814 (Cal. 1995).

magistrate, who determined that probable cause existed," for indirect contempt.[18] Deputies undeniably do not submit an affidavit for arrest of any pretrial participants.

Further, when looking "objectively at the reasonable conclusions that could have been drawn based on 'the facts known to the arresting officer at the time of the arrest,'"[19] it is clear no probable cause existed to include in an affidavit. This includes an analysis of whether the facts and circumstances "within the arresting officer's knowledge" are sufficient to cause "a prudent person to believe that the arrestee has committed or is committing an offense,"[20] taking into account both "inculpatory as well as exculpatory evidence."[21] Failure to submit to a test is substantially different than failing to "timely" submit to a test. The fact that participants are appearing for a test at the jail but are outside the one-hour testing window established by the defendant sheriff's department demonstrates pretrial participants are, in substance, "submitting" to a test.[22]

Defendants' assertions that they have probable cause based on their belief a participant was committing the crime of contempt[23] fails because not only is there no statutory support for an arrest by anyone but a judge for direct contempt of court based on probable cause,[24] there are no facts *for any pretrial participant that could exist* to

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[18] United States v. McCarty, 82 F.3d 943, 948 (10th Cir. 1996).(Noting specifically that the "totality of the circumstances contained in the affidavit constituted probable cause of indirect contempt.").

[19] Devenpeck v. Alford, 543 U.S. 146, 152 (2004).

[20] York v. City of Las Cruces, 523 F.3d 1205, 1210 (10th Cir.2008) (cleaned up).

[21] Wilder v. Turner, 490 F.3d 810, 814 (10th Cir. 2007), see also, United States v. Stephenson, 452 F.3d 1173, 1178 (10th Cir.2006).

[22] As discussed infra, the ambiguity in Wyoming Statute § 7-13-1709 is inherent in the law.

[23] Carr Brief Doc. 18 p.p. 17-18.

[24] Wy. R.Cr.Pro. Rule 42.

support contempt. Contempt requires a reasonably specific order; violation of the terms of the order; and willful intent to violate the order.[25] Here, the bail order "form" requires (1) twice daily testing, (2) enrollment in the program and (3) to contact the director of the program; but it does not specify a time for testing or location for testing for any pretrial participant.[26] Officers are arresting participants for *violating the sheriff's departments' arbitrarily set rules*[27] for timeliness, and they are not arresting them for violating the court order. No reasonable officer could interpret the order as requiring them to arrest participants for being late to testing by 30 minutes or on 3 occasions when the order itself does not state this nor can it be reasonably interpreted this way.[28]

3. Wyoming Statute § 7-13-1709 Is Void for Vagueness.

Due process analysis using strict scrutiny applies.[29] As defendants concede, the statute uses "problematic" language incorporating the standard of "in the officer's judgment" and only provides a hearing "within a reasonable time[.]"[30] Additionally, the statute authorizes immediate arrests for failure to submit to testing without informing plaintiffs or ordinary citizens what "failing to submit" to a test or even "passing a test" actually means. This vagueness has led to different interpretations and methods of

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[25] Weidt v. State, 312 P.3d 1035, 1042 (Wyo. 2013); Brown v. State, 393 P.3d 1265, 1277 (Wyo. 2017).

[26] Ball Release Order Doc. 3-1. Sanchez Release Order, Doc. 3-2.

[27] McLane Declaration ¶¶ 12, 13 ("[T]he 24/7 Program arrest rules vary by county resulting in the 24/7 Program being interpreted and applied differently to participants in Wyoming.")

[28] See, Shroff v. Spellman, 604 F.3d 1179, 1190 (10th Cir. 2010)(Holding that "[l]ack of arguable probable cause exists when an officer arrested Shroff for contempt of court for violating a restraining order after reading it and being informed Shroff was not a restrained person.").

[29] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[30] Carr Brief, Doc. 18 p. 17.

enforcement throughout the state.[31] The Teton County Sheriff's Department's policy to allow testing only during a one-hour testing window, twice daily, between the hours 6:00 a.m. and 7:00 a.m. and between the hours of 9:00 p.m. and 10:00 p.m. differs from the policy developed in Campbell County. Campbell County Sheriff's Department developed a three-hour window of testing, between the hours of 6:00 a.m. and 9:00 a.m. and a two-hour window of testing from 7:00 p.m. and 9:00 p.m. for evening testing. Teton County arrests participants for being 30 minutes late or late on 3 occasions to testing, while Fremont and Campbell County arrest participants for being one minute late to testing.[32] Further, Teton County requires jailing someone until they have a hearing, which could be up to six days. In contrast, Campbell County jails people for 12 hours for a first violation, 24 hours for a second violation and a hearing is held for the third violation.[33]

That sheriff's departments have created differing arrest rules to define when a participant should be arrested based upon the judgment of an officer as to when a participant fails to submit to testing is telling. In fact, this is the very concern the Supreme Court has warned against in its void for vagueness decisions.[34] Neither Wyoming Statutes §§ 7-13-1702 or 7-13-1709 "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[35]

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[31] McLane Declaration ¶¶ 8-13.

[32] Id. at ¶ 11.

[33] Id. at ¶ 8.

[34] See e.g. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[35] United States v. Corrow, 119 F.3d 796, 802 (10th Cir.1997) (quoting Kolender v. Lawson, 461 U.S. 352, 357(1983)).

4. The 24/7 Program Does Not Serve Wyoming's Bail Purposes.

The program is a general crime prevention statute expressly enacted to prevent repeat crime from drug and alcohol abuse being implemented by sheriffs in Teton,[36] Fremont, Sweetwater and Campbell counties who regularly arrest participants for being late to testing. Neither the challenged statutes nor their implementation serve Wyoming's "primary purpose of a bond," which "is to insure the defendant's presence to answer the charges without excessively restricting his liberty pending trial."[37] There is *no evidence* to show that the "problem of releasees failing to appear in court as result of drug [or alcohol] use" justifies intruding on privacy rights of every pretrial participant who has a drug or alcohol related charge.[38] Nor have defendants offered any evidence that pretrial participants, "in particular [are] likely to engage in future [substance abuse] that would decrease likelihood of [their] appearance," because, like in Scott, Wyoming law "[does] not recognize a connection between [substance abuse] and nonappearance at trial," making the connection between the 24/7 Program (substance abuse) and legitimate purposes of bail, tenuous.[39]

The bond release orders at issue in this case are a pre-printed "form" with conditions that are checked off and signed by a judge.[40] Nothing unique to the plaintiffs or pretrial participants is included such as an area to list specific reasons as to why

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[36] McLane Decl. ¶ 36. Teton County alone administered 1,501 PBT tests, 842 drug tests and 76 remote tests.

[37] Miller v. State, 560 P.2d 739, 742 (Wyo. 1977); see also W.S. § 7-10-102. Wy. R. Crim. Pro. 46.1(a).

[38] United States v. Scott, 450 F.3d 863, 870 (9th Cir. 2006). Application of Allied Fid. Ins. Co., 664 P.2d 1322, 1324 (Wyo. 1983).

[39] Id.

[40] Ball Release Order Doc. 3-1. Sanchez Appearance Bond, Doc. 3-2. Marx Appearance Bond Ex. 2.

the program is imposed, why this participant is required to participate, or might be more likely than another to commit repeat criminal offenses while on bond due to substance abuse. No findings of fact or conclusions of law are entered, either.[41]

Wyoming Rule of Criminal Procedure 46.1 (c)(1)(a) already requires releasees to remain law abiding while released on bond. That would include not driving while impaired. Under Wyoming Rule of Criminal Procedure 46.4, when this or any condition is violated, a warrant is required to be sought, notice provided to the accused, an opportunity to be heard and a hearing is held before punishment through jailing.[42] These are constitutionally sound methods to enforce a bond violation and already available for use by judges and law enforcement in Wyoming.

CONCLUSION

No evidence offered by the defendants suggests that there was ever a problem with enforcing bond conditions; that repeat crime was committed so significantly due to drug and alcohol abuse while on pretrial release necessitating a new law to address it; DUI's are reduced as a result of the 24/7 Program; and that the currently worded version of the program's statutes, Wyoming Statutes §§ 7-13-1708 and 7-13-1709 serve these purposes. The Wyoming 24/7 Program's challenged statutes and administrative rules should be enjoined to prevent future loss of liberty to all pretrial participants and plaintiffs.

Respectfully submitted this 4th day of April, 2022.

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[41] Id.

[42] W.R.Crim.P. 46.4.

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CERTIFICATE OF COMPLIANCE

This brief complies with Wyoming Local Civil Rule 7.1(2)(C) because it contains 10 pages, not including the cover page, table of contents, signature block, certificate of service and this certificate.

This 4th day of April 2022.

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CERTIFICATE OF SERVICE

I certify that on the 4th day of April, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States District Court for the District of Wyoming by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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