NO. _____

In the
Supreme Court of the United States

KRISTOPHER ALAN MATKIN, DAVID EVANS, ALLEN MIDDLETON, HARRY WITHERSPOON, ANTIONNE WOLF, Individually, and on behalf of all others similarly situated,

Petitioners,

v.

SHERIFF JACQUELINE BARRETT, FORMER SHERIFF OF FULTON COUNTY, GEORGIA,

Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012), this Court ruled narrowly that a jail may strip search an arrestee without reasonable suspicion before admitting him into general population, provided that he was arrested on a warrant, the charges were reviewed by a neutral magistrate, and there was no alternative to holding him in general population. *Id.* at 1523. Two Justices wrote separately to emphasize the limits of the decision. Four Justices dissented.

Petitioners here were either arrested for minor offenses and strip searched without reasonable suspicion before a neutral magistrate reviewed the charges against them, or even more remarkably, they were strip searched after a magistrate ordered them to be released. At all relevant times, they could have been held outside general population. Applying the sweeping *per se* rule that *Florence* refused to adopt, the Eleventh Circuit held that a person may be strip searched, regardless of the circumstances, provided only that the jail chooses to put him or her into general population.

The question presented is whether the Fourth Amendment permits the strip search of any person under any circumstances—including when there are alternatives to holding him in general population, a magistrate has not yet reviewed the charges against him, or even after a neutral magistrate has ordered him to be released—provided only that a jail chooses to put him into general population.

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PETITION FOR WRIT OF CERTIORARI

The Eleventh Circuit's decisions below establish a *per se* rule that anyone who is arrested for any offense, no matter how minor, can be strip searched under any circumstances, if the jailer chooses to put him into general population. Indeed, the decisions below countenance strip searches of men before a neutral magistrate reviewed the lawfulness of their arrests—*and even after a neutral magistrate ordered them to be released*. To make matters worse, there was no need to put these men into general population in the first place.

The Eleventh Circuit's *per se* rule conflicts with *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012), *Bell v. Wolfish*, 441 U.S. 520 (1979), and this Court's broader Fourth Amendment jurisprudence. First, the rule conflicts with this Court's repeated command that, in this sensitive context, balancing is a must. Second, the decisions below overstep *Florence*'s carefully-crafted and deliberate limitations. *Florence* permits a person who is being placed in general population to be strip searched when (1) he was arrested pursuant to a facially valid warrant; (2) the charges were "reviewed by a magistrate or other judicial officer"; and (3) he could not "be held in available facilities removed from the general population." 132 S. Ct. at 1522–23. Chief Justice Roberts and Justice Alito each wrote separately to underscore these limits so as to "not embarrass the future." *Id.* at 1523 (Roberts, C.J., concurring) (quotation marks omitted); *see also id.* at 1524–25 (Alito, J., concurring). Four Justices

dissented. But the decisions below wholly lack such nuance. Instead, they adopt the blanket rule this Court refused to adopt: They allow anyone placed in general population to be strip searched, without regard to any other circumstances.

Especially when viewed in light of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the decisions below set an alarming precedent. On any given day, millions of ordinary citizens could be arrested without a warrant for minor and ubiquitous offenses. As *Atwater* recognized, a neutral magistrate plays a vital and necessary role in limiting this risk. At the initial hearing, a magistrate can ensure that detention for a fine-only offense stops immediately. *See id.* at 348, 352. And the more nuanced rule *Florence* embraced relies on the intervening role of a neutral magistrate. 132 S. Ct. at 1522–23. The decisions below, by contrast, eviscerate this protection. The strip searches here occurred either before the magistrate's review or, more astonishingly, *even after the magistrate ordered these men to be freed*. Under the *per se* rule embraced below, ordinary citizens' only protection against a strip search is the executive's own exercise of discretion about whom to arrest and whom to put into general population.

This is also a good vehicle for review that is desperately needed. Like many cases in this context, this one arises on a qualified immunity posture. But the decisions below do not rest on the "clearly established" prong of the qualified immunity analysis. Rather, the Eleventh Circuit squarely held that the searches here did not violate the Fourth

Amendment. The opinions below also illustrate the breadth of the *per se* rule, as there is essentially no discussion of the factual circumstances because such considerations were deemed irrelevant. The fact that some petitioners were strip searched after a magistrate ordered that they were entitled to their freedom does not even enter into the calculus.

OPINIONS BELOW

The Eleventh Circuit issued four relevant opinions. The Eleventh Circuit's first panel opinion (App. 1) is reported at 496 F.3d 1288. The Eleventh Circuit's en banc opinion (App. 60) is reported at 541 F.3d 1298. A subsequent panel opinion remanding to the district court (App. 109) is unreported. The final panel decision (App. 113) is also unreported.

The Northern District of Georgia issued three relevant opinions. The first (App. 127) dismissed for failure to state a claim and is reported at 376 F. Supp. 2d 1340. The second (App. 168) and third (App. 185) granted summary judgment to Respondent and are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit rendered its final decision in this case on March 7, 2013. On May 15, 2013, Justice Thomas extended the time for filing this petition to July 19, 2013.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Civil Rights Act of 1871, 42 U.S.C. § 1983, is reproduced at App. 247.

STATEMENT OF THE CASE

A. The Fulton County Jail's Blanket Strip-Search Policy

Fulton County is the largest county in Georgia and encompasses most of Atlanta. Nearly 1 million people call it home, and nearly 500,000 more commute in for work. U.S. Census Bureau, 2012 Population Estimates, http://1.usa.gov/QDBGK; U.S. Census Bureau, Press Release CB13-R.08, *Census Bureau Reports 486,000 Workers Commute into Fulton County, Ga., Each Day* (Mar. 5, 2013), http://1.usa.gov/12xEDVI.

When Respondent was Fulton County Sheriff, the Fulton County Jail ("Jail") established a blanket policy of strip searching every person who was arrested and brought to the Jail. "Every person booked into the Fulton County Jail general

population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search, and regardless of the crime with which the person is charged." App. 63. These strip searches were part of the initial "booking" process. App. 212; *see also* App. 237–38. That is, each search was "incident to the intake process." App. 238; *see also* App. 212. The policy also required strip searches of every person who "re-enter[ed] the general population" after leaving the Jail. App. 62.

At all relevant times, the policy required "[v]isual body cavity searches … on all persons committed into the Fulton County Jail." App. 244 (emphasis omitted). The aim was "to permit a visual inspection of the genitals, buttocks, anus, breasts, or undergarments." App. 243. Men were herded into "a large room with a group of up to thirty to forty other inmates," where they were ordered to "remove all of [their] clothing, and place the clothing in boxes." App. 63. "The entire group" was forced to "shower in a single large room." *Id.* Next, "each arrestee 'either singly, or standing in a line with others, [wa]s visually inspected front and back by [the Jail's] deputies.'" *Id.* Petitioners testified that they were required to lift their genitals then "squat and cough while the guard watched." Matkin's Individual Resp. to Def.'s. Interrogs. No. 11 (Doc. 270-5) ("Matkin Interrogs."). They were also required to "turn around, … bend over, and spread [their] butt cheeks while the guard looked at [their] anus[es]." Middleton's Individual Resps. to Def.'s Interrogs., No. 11 (Doc.

270-7) ("Middleton Interrogs."). As Petitioner Evans put it, the search made him "feel less than a man." Evans Dep. 101:16 (Doc. 270-18).

B. Petitioners' Strip Searches and Lawsuit

Petitioners were arrested, brought to Fulton County Jail, and strip searched without individualized suspicion pursuant to the Jail's blanket policy. Petitioners brought a putative class action in the United States District Court for the Northern District of Georgia against Respondent under 42 U.S.C. § 1983. They alleged, among other things, that these searches violated the Fourth and Fourteenth Amendments. App. 200–03.[1]

Petitioners fit into three putative classes. First, the arrestee or "AR" Petitioners were arrested, transferred to general population, and strip searched without individualized suspicion as part of the jail's routine booking process, which typically occurred before a neutral magistrate reviewed the legality of the detention. App. 6–7. For example, Petitioner Allen Middleton was strip searched after being arrested on a warrant for an unpaid $27 traffic ticket and before a magistrate reviewed his detention. App.

[1] The Complaint also alleged that some plaintiffs were "overdetained," *i.e.*, jailed when there was no longer a lawful basis for holding them. These claims were dismissed on qualified immunity grounds and are not presented.

39.[2] Petitioners Witherspoon and Wolf are also AR Petitioners.

Second, the alpha or "AL" Petitioners were arrested, given a hearing before a neutral magistrate at the Jail, and then strip-searched *after* the magistrate ordered them to be released. App. 219–20. Because of bureaucratic inefficiency at the Jail, they were ordered released "before their point-of-entry booking into the Jail was started or completed." App. 5. These individuals thus completed the booking process—which required a strip search—only "*after* posting bond or having been ordered released at the Jail." App. 7.

Petitioner Kristopher Alan Matkin is the only named AL Petitioner. According to Matkin's record testimony, he was arrested for getting into a fight with a friend on Saint Patrick's Day. For over a day, both men were held outside general population. Matkin Dep. 22:21–22 (Doc. 270-16); Matkin's Interrogs. No. 3. They were then brought before a neutral magistrate at the Jail. When the two friends told the magistrate that they would not press charges, the magistrate had them hug to show their goodwill and dismissed the charges. Matkin Dep. 28:1–12. Nonetheless, the Jail continued to hold

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[2] Because the AR claims were dismissed under Rule 12(b)(6), the facts relating to AR claims come from the Complaint. Two AR plaintiffs, C. Alan Powell and Stanley Clemons II, were dismissed for failure to prosecute and are no longer putative class representatives. Powell and Clemons, however, would still be class members.

Matkin and eventually moved him into general population. He was strip searched and finally released days later. Matkin Interrogs., No. 8.

Third, the court return or "CR" Petitioners were strip searched after a neutral magistrate at a state court outside the Jail ordered them released. App. 8–9, 220–21. They "were strip searched upon their return from the courthouse before being booked back into the general jail population, where they were held while the Records Room searched for outstanding detention orders, warrants, and other holds before releasing them." App. 42.

For example, Petitioner Antionne Wolf was arrested for failing to pay child support. He was jailed, strip searched, and put in general population. Wolf's Individual Resps. to Def.'s Interrogs., No. 8 (Doc. 270-13) ("Wolf Interrogs."). Several weeks later, Wolf had a state court hearing where he was ordered released. Wolf Release Order (Doc. 270-12). He was "under constant supervision while in transit to and from the Jail and while at the courthouse," and was "not permitted to have contact with anyone other than the Sheriff's deputies and their attorneys." App. 45. Wolf averred that he was nonetheless brought back to the Jail and, after initially being held outside general population, was placed back into general population, which required him to be strip searched yet again before he was finally released the next day. Wolf Interrogs., No. 8. Petitioners Wolf and Evans are CR Petitioners.

C. The Decisions Below

1. The District Court initially dismissed the suit for failure to state a claim, holding that Respondent was entitled to qualified immunity. App. 145.

An Eleventh Circuit panel affirmed in part, reversed in part, and remanded. First, the panel affirmed the dismissal of AR plaintiffs whose alleged offenses involved violence or drugs. App. 38–39. As a result, all of the remaining plaintiffs are individuals who were strip searched after being arrested for offenses that were neither violent nor drug-related, or were strip searched after being ordered released.

Second, the panel held that Petitioners' allegations showed a violation of clearly established constitutional rights. *See* App. 33–52. Under Eleventh Circuit precedent at the time, an arrestee had a Fourth Amendment right "to be free from strip searches conducted without reasonable suspicion that the detainee is concealing weapons, drugs, or other contraband." App. 33–34 (citing *Wilson v. Jones*, 251 F.3d 1340, 1341, 1343 (11th Cir. 2001)). Thus, the panel held that the remaining AR plaintiffs had alleged a clearly established violation of their constitutional rights because they were strip searched without reasonable suspicion. App. 49. And the panel found the violation "even more obvious" for the AL and CR petitioners, who were strip searched after a magistrate ordered them released. App. 52.

2. The Eleventh Circuit granted en banc review of the AR claims and affirmed their dismissal. *See* App. 94. The en banc court overruled *Wilson*, in favor of a categorical rule that suspicionless strip searches

are constitutional any time a person is arrested and put into a jail's general population. *See* App. 65–94. The panel required only that the search be "no more intrusive" than the "visual body cavity strip searches" the Supreme Court upheld in *Bell*. App. 61, 65, 93.[3]

The en banc court remanded to the panel to consider the AL and CR claims in light of the en banc ruling. App. 94. Although the appeal was from a motion to dismiss, the panel never assessed whether the Complaint stated a claim. Instead, the panel remanded to the District Court for "further factual development" of the AL and CR claims, including but

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[3] The Complaint alleged that men were "visually inspected front and back by deputies." App. 212. The en banc court construed this allegation against Petitioners as indicating that these searches were less intrusive than the visual body cavity searches in *Bell*. App. 91 ("The strip searches [here] did not include body cavity inspections."). This was inappropriate on a motion to dismiss and is simply wrong on the facts. Petitioners had clarified that they alleged visual body cavity searches. Appellees' *En Banc* Br. in Opp. 6, 8 n.7 (May 5, 2008). And the Jail's policy was to perform "[v]isual body cavity searches … on all persons committed into the Fulton County Jail." App. 244 (emphasis omitted). Petitioners testified that, during the strip searches, they were required to "lift up [their] genitals" and "squat and cough while the guard[s] watched." Matkin Interrogs., No. 11. They were also required to "turn around, … bend over, and spread [their] butt cheeks while the guard[s] looked at [their] anus[es]." Middleton Interrogs., No. 11. The improper construction of the Complaint was immaterial to the outcome of the en banc decision, however. By all accounts, the searches were "no more intrusive" than the "visual body cavity strip searches" in *Bell*. App. 61, 65, 93.

not limited to a series of factual issues the panel identified. *See* App. 110.

3. On remand, Petitioners introduced evidence that the searches were unreasonable, including that the Jail at times held Petitioners outside general population. For example, Matkin averred that he was held outside general population for over a day before seeing the magistrate. Matkin Dep. 22:21–22; *see also* Def.'s Supplemental Resp. to Interrogs., No. 3 (Doc. 269-9). And Matkin and Wolf both averred that, after the magistrate ordered their release, they were first held outside general population, and were only strip searched later when the Jail moved them into general population before releasing them. Wolf Interrogs., No. 8; Matkin Dep. 31:18–20.

The District Court granted summary judgment to Respondent, holding that strip searching the AL and CR Petitioners did not violate the Fourth Amendment. App. 175–76, 184. Notably, the decision does not address the record evidence introduced on remand. Instead, any factual nuance was irrelevant under the District Court's application of the en banc rule: "[T]he inmates' Fourth Amendment rights were not violated" because they were "subjected to strip searches prior to entering the general population." App. 175; App. 179 ("[S]trip searches before re-entering the general population are justified under the Eleventh Circuit's *en banc* decision.").

After the District Court granted summary judgment to Respondent, this Court decided *Florence*. In *Florence*, this Court held that a strip search during admittance into general population was

consistent with the Fourth Amendment but cautiously limited its decision to the facts presented. The Court emphasized that (1) the petitioner had been arrested pursuant to a facially valid warrant; (2) the charges against him were "reviewed by a magistrate or other judicial officer" before the search; and (3) he could not "be held in available facilities removed from the general population." 132 S. Ct. at 1522–23. This nuance was critical to the Court's holding. Chief Justice Roberts and Justice Alito each wrote separate concurrences, underscoring the limits of the Court's holding. *Id.* at 1523 (Roberts, C.J., concurring); *id.* at 1524–25 (Alito, J., concurring). Four Justices would have found the search unconstitutional. *Id.* at 1525 (Breyer, J., dissenting).

4. Despite *Florence*'s express limitations, a new Eleventh Circuit panel affirmed the dismissal of the remaining claims, which only involved people who had been strip searched after a magistrate ordered them to be released. According to the panel, the en banc decision and *Florence* established a bright-line rule that a jail may strip search any person it chooses to put into general population: "Under both *Florence* and *Powell III*, jailers do not violate detainees' Fourth Amendment rights by visually searching them for legitimate safety and penological reasons prior to admitting or readmitting them to the Jail's general population." App. 126. Under this blanket rule, one fact alone established that there was no Fourth Amendment violation: "[E]ach Plaintiff here—whether after a first appearance hearing at the Jail or after court returns—was actually placed

in the general Jail population and the challenged strip searches occurred due to their entering for the first time or reentering the general Jail population." App. 126.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari for three basic reasons. First, the Eleventh Circuit's *per se* rule conflicts with *Florence* and *Bell* and this Court's broader Fourth Amendment jurisprudence. Where this Court requires nuance, the *per se* rule ignores such limitations and any balancing. Nothing in *Florence* or in any decision of this Court endorses a suspicionless strip search of a person arrested for a minor offense and not yet seen by a neutral magistrate, let alone after a magistrate has determined that he is entitled to be released. The error is also particularly glaring because record evidence showed alternatives to holding these men in general population.

Second, in light of *Atwater*, the decisions below establish a dangerous rule that demands immediate correction. Under the decision below, anyone arrested in the Eleventh Circuit could be strip searched, even for a commonplace minor offense, without any meaningful protection from a neutral magistrate. Indeed, the decisions below upheld strip searches of individuals who had not yet seen a magistrate, and even more astonishingly, individuals who had been ordered to be released.

Third, this case is a good vehicle, as it squarely presents a question that demands expeditious

review. The nature of the government conduct endorsed here does not lend itself to further "percolation." For the millions of people who live in and travel through the Eleventh Circuit, the only meaningful check against this extraordinary executive overreach is the executive's own discretion. This Court should not allow this misguided *per se* rule to stand.

I. The Decisions Below Overstep *Florence*'s Limitations And Conflict With This Court's Fourth Amendment Jurisprudence.

A. *Florence* Refused To Adopt a *Per Se* Rule that any Person Can Be Strip Searched Simply Because a Jail Chooses To Put Him into General Population.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons … against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." "[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). And this Court has been especially wary of searches without a warrant or individualized suspicion. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 308 (1997).

In *Bell* and *Florence*, this Court reviewed warrantless and suspicionless strip searches performed for jail security. In both cases, this Court declined to issue officials a blank check, but rather proceeded cautiously. "The test of reasonableness

under the Fourth Amendment is not capable of precise definition or mechanical application." *Bell*, 441 U.S. at 559; *Florence*, 132 S. Ct. at 1516 ("[t]here is no mechanical way to determine whether intrusions on an inmate's privacy are reasonable."). "In each case," the Constitution "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559. Courts "must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

Bell applied these principles to address suspicionless strip searches of convicted criminals and "pretrial detainees," that is, people "who have been charged with a crime but who have not yet been tried on the charge." *Id*. at 523. Specifically, *Bell* held that such detainees could be strip searched after "contact visit[s]" with outsiders before they returned to general population. *Id*. at 558. The Court did not "underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560. But the penological interests were substantial. "A detention facility is a unique place fraught with serious security dangers," and "[s]muggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id*. at 559. Balancing these concerns, the Court held that the jail may strip search convicts or pretrial detainees after contact visits to prevent them from smuggling contraband back into general population. *Cf. Block v. Rutherford*, 468 U.S. 576, 586–87 (1984)

(upholding total ban on contact visits to prevent smuggling).

In *Florence*, this Court applied the same principles to reach a similarly nuanced result. The Court reiterated that, in every case, "[t]he need for a particular search must be balanced against the resulting invasion of personal rights." 132 S. Ct. at 1516. Specifically, the Court rejected the argument that there was a blanket "minor offenses" rule forbidding strip searches of any "new detainee who has not been arrested for a serious crime or for any offense involving a weapon or drugs." *Id.* at 1520. "[C]orrectional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities." *Id.* at 1517. And a "minor crimes" exception would be underinclusive and difficult to administer. *Id.* at 1520, 1522.

At the same time, however, *Florence* refused to adopt the opposite rule that, simply because a jail chooses to put a person in general population—for any reason and under any circumstances—he can be strip searched. Indeed, Part IV of *Florence* is devoted to these limits. *Id.* at 1522–23. The Court expressly stated that it did not reach strip searches of a person arrested for a minor crime without a warrant, "whose detention has not yet been reviewed by a magistrate or other judicial officer," or "who can be held in available facilities removed from the general population." *Id.* Two of the five Justices in the majority wrote separately to emphasize these limitations. The Chief Justice found it "important"

that "Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest," and that "there was apparently no alternative … to holding him in the general jail population." *Id.* at 1523. Justice Alito similarly stated that "the Court d[id] not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population." *Id.* at 1524. "For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible." *Id.*

The nuance *Florence* demanded is critical in light of this Court's earlier decision in *Atwater*. Perhaps a different approach would be reasonable in a regime where only felonies could lead to warrantless arrests, but that is not the rule under *Atwater*. Instead, *Atwater* held that a person may be arrested for any offense committed in the presence of an officer, even if punishable only by a fine. 532 U.S. at 323. And in *Florence*, the Court appeared concerned that a *per se* rule allowing strip searches would lead to troubling results in light of *Atwater*. Atwater had been arrested for fine-only offenses and was held outside general population until her initial hearing, when she posted bond and was released. *See id*. While explaining that *Florence* did not condone strip searches of people arrested for minor offenses who could be held outside general population, the Court's opinion pointedly noted that this "describe[d] the circumstances in

Atwater." 132 S. Ct. at 1523. The Chief Justice emphasized that, unlike *Atwater*, "Florence was detained not for a minor traffic offense but instead pursuant to a warrant," and "there was apparently no alternative … to holding him in the general jail population." *Id.* And Justice Alito suggested that a strip search following a warrantless arrest for a minor offense "may not be reasonable," noting favorably that the federal government "segregate[s] temporary detainees who are minor offenders from the general population." *Id.* at 1524.

B. The Decisions Below Nonetheless Overstep These Limitations and Establish a *Per Se* Rule.

Overstepping *Florence*'s express limitations and flouting this Court's deliberately nuanced approach, the court below adopted and applied a *per se* rule that strip searches are always permissible whenever a jail chooses to place a person in general population.

Without having the benefit of the subsequent *Florence* decision, the en banc Eleventh Circuit held, without qualification, that "strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible." App. 61. Then, even with the benefit of *Florence*, the panel below did the en banc court one better by holding that, as long as a search precedes introduction into the general population, it is therefore reasonable. App. 126.

The opinions are striking for the absence of the balancing *Bell*, *Florence*, and common sense require. For example, the en banc opinion frankly acknowledged that "[t]he reasoning that leads us to uphold the searches of these five plaintiffs is simple." App. 65. To the Eleventh Circuit, *Bell* itself stands for the categorical rule that the Fourth Amendment does not "require[] reasonable suspicion before an inmate entering or reentering a detention facility may be subjected to a strip search that includes a body cavity inspection." App. 77.

But the lower court's blinkered focus on placement into general population conflicts with both *Bell* and *Florence* and the Fourth Amendment's overarching command of reasonableness. Indeed, this *per se* rule renders immaterial Part IV of *Florence* by disregarding any other circumstance, including whether (1) a person has been arrested for a minor crime without a warrant; (2) a person's detention has been reviewed by a neutral magistrate; or (3) there are feasible alternatives to putting a person in general population and strip searching them for contraband. 132 S. Ct. at 1522–23. Rather, the bare fact that a jailer puts a person into general population renders his strip search reasonable.

The final panel opinion below only underscores the breadth of this *per se* rule. At issue were the AL and CR claims, involving men who were strip searched and sent to general population *after a neutral magistrate had ordered them to be released*. There can hardly be a more gratuitous violation of personal liberty than to be detained and strip

searched after a magistrate has concluded that your detention must end. Furthermore, record evidence showed that, even if the jail could properly choose to continue detaining these men for processing, there was an alternative to this procedure: They could have been held outside general population. *See, e.g.*, Matkin Dep. 22:21–22; Wolf Interrogs., No. 8.

Yet without any discussion of these facts or record evidence—as *Florence*, *Bell*, and common sense require—the panel applied the en banc court's *per se* rule to dismiss. "Under both *Florence* and *Powell III*, jailers do not violate detainees' Fourth Amendment rights by visually searching them … prior to admitting or readmitting them to the Jail's general population." App. 126. Just like the en banc court ignored *Bell*'s instructions against *per se* rules in this context, the final panel's citation to *Florence* misstates this Court's holding and ignores the fact that Petitioners here fall well outside *Florence*'s carefully-drawn bounds.

C. The State's Interests Do Not Justify the Extreme Invasions of Privacy Here.

Under *Florence* and *Bell*, Petitioners' constitutional rights have clearly been violated. Those precedents and others dictate that the Fourth Amendment analysis requires balancing of "[1] the scope of the particular intrusion, [2] the manner in which it is conducted, [3] the justification for initiating it, and [4] the place in which it is conducted." *Bell*, 461 U.S. at 559.

The intrusion here is extraordinary. As in *Bell* and *Florence*, the searches in this case involve forcing Petitioners to strip completely naked in front of a group of strangers so that guards could visually inspect their "genitals, buttocks, anus, breasts, or undergarments." App. 243. "Undergoing such an inspection is undoubtedly humiliating and deeply offensive to many …." *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring). The "meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377 (2009). As Petitioner Evans aptly put it, the search made him "feel less than a man." Evans Dep. 101:16.

Moreover, this case involves greater privacy interests than *Florence* or *Bell*, which involved men whose detentions had been approved by a neutral magistrate. *See Florence*, 132 S. Ct. at 1522–23; *Bell*, 441 U.S. at 523. By contrast, Petitioners here were on the cusp of the criminal process. They had either just been arrested for non-violent and non-drug-related offenses without review by a magistrate and thus were likely "to be released from custody prior to or at the time of their initial appearance before a magistrate," *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring), or a magistrate had, in fact, already ordered their release. They had every reason to expect that their intimate privacy would be respected and that they would be treated like the ordinary citizens they were. *See Barnes v. District of Columbia*, 793 F. Supp.2d 260, 289–90 (D.D.C. 2011)

(strip searches after a release order "are particularly suspect given that they are happening to persons who are no longer prisoners in the eyes of the law.").

To be sure, a jail has a powerful interest in keeping contraband out of general population. "There is a substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when he is admitted to the general population." *Florence*, 132 S. Ct. at 1520. But unlike in *Florence* or *Bell*, the Jail here had no valid reason for placing these men into general population that would be strong enough to justify the concomitant indignity of a strip search.

First, unlike in *Florence* or *Bell*, there were alternatives to putting these men into general population. Indeed, record evidence introduced on remand showed that the Jail could—and often did—hold men outside general population. Matkin was held outside of general population for days after being arrested, receiving his hearing, and being ordered released. Matkin Dep. 22:21–22, 31:18–20. And when a court ordered Wolf to be freed, the Jail first detained him outside general population. *See* Wolf Interrogs., No. 10. Only later did the Jail choose to move him back into general population, strip searching him a day before his ultimate release.

And there was always an infinitely less intrusive alternative for the AL and CR Petitioners, who were strip searched after being ordered released: They could have simply been freed. For example, citizens arrested in Los Angeles County once suffered from

the same iniquity of being brought back to general population—and thus strip searched—even after a court ordered them to be released. L.A. County Sheriff's Dep't, 17th Semiannual Report 75–76 (Nov. 2003), http://file.lacounty.gov/lac/mbobb17.pdf. As here, Los Angeles County's own disorganization and delayed paperwork was largely to blame for these strip searches. *Id*. But in response to a lawsuit, the County revamped its procedures to do the necessary paperwork promptly at the courthouse, allowing it to release men outright and thereby avoid the strip search altogether. *Id*.; *see also Bynum v. District of Columbia*, 384 F. Supp.2d 342, 344 (D.D.C. 2005) (approving similar alternative to avoid court-return strip searches in the District of Columbia). Under the decision below, however, the existence of this or any other alternative was irrelevant. Furthermore, in the Eleventh Circuit, jails now have no legal incentive to streamline their processes to avoid court-return strip searches, because these searches are already lawful.

Second, the Jail did not have an interest that could justify strip searching the AR Petitioners before their initial hearings. The AR Petitioners were, by definition, arrested for minor offenses that were neither violent nor drug-related. App. 38–39. "Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate." *Florence*, 132 S. Ct. at 1524 (Alito, J., concurring). Given the likelihood of release at the initial appearance coupled with the Jail's ability to hold them outside general population, it was not

reasonable to move them into general population and strip search them.

For example, Petitioner Middleton was strip searched following his arrest on a warrant for a $27 traffic ticket. There was no realistic probability he would be sentenced to custody. For him and others, being strip searched as part of the Jail's routine process was far worse than the maximum punishment a court would ever impose for his offense. *Cf.* Malcolm M. Feeley, *The Process Is The Punishment* 30 (1992) (for minor offenders, "it is the cost of being caught up in the criminal justice system itself that is often most bothersome").[4]

Many Petitioners were strip searched because of the Jail's dysfunctional and Kafkaesque bureaucracy. Under the Jail's policy, the strip search was "incident

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[4] Petitioner Middleton's AR claims were dismissed on these bare facts for failure to state a claim. Discovery on remand, however, revealed facts that were far worse. The warrant on its face did not permit his arrest in Atlanta, as it was expressly limited to arrest within "50 miles from [the] Richmond Co[unty] line." Middleton Jail File, Pltfs' Ex. List, Ex. 7 at 27 (Doc. 270-23). Richmond County is on the other side of Georgia, approximately 150 miles from Fulton County where he was arrested. Middleton was held outside general population for a day, when the Jail received further confirmation that Richmond County did not seek to hold him. *See* Middleton Interrogs., No. 11. The Jail nonetheless continued to hold him outside general population for two more days, at which point the Jail chose to move him into general population. *See id*. Middleton was then strip searched. *Id*. He was released later that day, without ever actually being taken into general population. *Id*. His arrest was never reviewed by a magistrate. *See id*., No. 10.

to the intake process." *See* App. 215–18, 238. Accordingly, when the Jail was too inefficient to finish the intake process until after a magistrate ordered a person released, that person would still be strip searched just to finish the "intake process." In other words, men would be put into general population—and strip searched—because the Jail was behind on its paperwork. Similarly, the Jail's policy was to strip search inmates "when returning from court appearances"—without regard to outcome. *See* App. 238; Barrett Dep. 51:13–15, 52:3–8 (Doc. 270-22). This policy ensured that innocent people entitled to immediate freedom would be strip searched.

Notably, neither Respondent nor the courts below articulated a reason for putting men who were entitled to immediate release back into general population and subjecting them to the humiliation of a strip search in the process. Instead, Respondent and the courts below asserted that there was no clearly established right to be held outside general population. App. 125; Mot. for Summ. J. at 23–24 (Doc. 269). But that completely misses the point. The government cannot make a humiliating strip search an automatic consequence of being introduced into the general population and then escape all liability for a completely unjustified Fourth Amendment deprivation by changing the subject from the search to the circumstances of the detention. The Fourth Amendment claim here is not that it was unconstitutional to put Petitioners into general population—*it is that it was blatantly*

unconstitutional to strip search them after a court ordered them to be released.

Florence and *Bell* rest on the state's security interest, as jail custodian, in preventing inmates from smuggling contraband into the general population. But for Petitioners who were strip searched after being ordered released, the invasion of privacy is "balanced against nothing" because the search is "needless, a product of the [jail's] insistence on maintaining a policy that subjects free men and women to degrading treatment when reasonable alternatives are readily available." *Barnes*, 793 F. Supp.2d at 290. The state cannot legitimately rely on its security interests as a custodian when the security problem is of the state's own making. *Cf. Kentucky v. King*, 131 S. Ct. 1849, 1857 (2011) (discussing the "police-created exigency doctrine," which prohibits warrantless searches premised on an exigency "'created' or 'manufactured' by the conduct of the police"). The state could have easily avoided this security problem altogether: Rather than continuing to hold these men and putting them back into general population, the Jail could have followed court orders and released them.

D. The Decisions Below Cannot Be Squared with this Court's Broader Fourth Amendment Jurisprudence.

The Eleventh Circuit's rule also makes nonsense of this Court's Fourth Amendment jurisprudence. For example, under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), a drunk driver who is arrested cannot, without more, be given an alcohol blood test. *Id.*

at 1556. Blood tests "ha[ve] become routine in our everyday life," *Schmerber v. California*, 384 U.S. 757, 771 n.13 (1966) (internal quotations omitted), and there will always be reasonable suspicion to believe they will detect evidence of a crime, but this Court stressed "the importance of requiring authorization by a neutral and detached magistrate" before allowing such an intrusive search. 133 S Ct. at 1558 (internal quotations omitted). Indeed, *McNeely* warned against adopting "an overly broad categorical approach … in a context where significant privacy interests are at stake." *Id.* at 1564.

Yet the Eleventh Circuit below adopted the "overly broad categorical approach" *McNeely* warned against, and did so in a context where the privacy stakes are much higher. As a result, a suspected drunk driver who could not be given a blood test to prove his intoxication without a warrant could be strip searched in front of a gaggle of other prisoners, without review by a neutral magistrate or any suspicion he possesses contraband. *Cf.* App. 39 (AR Petitioner Harry Witherspoon was strip searched after an arrest for driving under the influence).

Similarly, a school cannot search under a student's underwear when it reasonably suspects that she has forbidden prescription and over-the-counter drugs but lacks reasonable suspicion she was hiding them in her underwear. *See Redding*, 557 U.S. at 368. Yet if police share the same suspicions, they could arrest the same student, take her downtown, strip her naked in front of a large group, and visually search her body cavities.

The decisions below also make little sense in light of *Maryland v. King*, 133 S. Ct. 1958 (2013). *King* divided this Court 5–4 on the question whether the extraordinary advances of DNA technology outweighed the "minimal intrusion" of taking a cheek swab from every arrestee. *Id.* at 1979. But the Eleventh Circuit below allowed a far greater invasion of privacy, on an equally blanket basis, to serve weaker government interests, with nary a hint that this was a difficult question.

Indeed, the dissent's concerns in *King* apply with particular force here. The *King* dissenters objected that by searching all *arrestees* (rather than all convicts), blanket DNA testing would certainly search people who would ultimately be acquitted or released. *Id.* at 1989 (Scalia, J., dissenting). Searching arrestees "manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." *Id.* Here, the invasion of privacy is much greater—this is a strip search, not a cheek swab. And the policy here burdens the innocent in precisely the same way. By choosing to strip search all arrestees, including before an initial hearing and even after a successful initial hearing ordering them released, the Jail guaranteed it would strip search the innocent. Indeed, its choice to strip search people *after a magistrate has determined they must be released* is perfectly tailored to cause unjustifiable harm.

II. The Eleventh Circuit's *Per Se* Rule Sets A Dangerous Precedent That The Only Meaningful Protection Against A Strip Search Is The Executive's Own Discretion.

When viewed in light of *Atwater*, the decisions below set a dangerous precedent where virtually any ordinary citizen can be arrested and strip searched, without meaningful protection from a neutral magistrate. In *Atwater*, this Court could adopt a bright-line and easily administrable rule for officers on the street because, on the back end, a neutral and detached magistrate provided vital case-by-case protection against police overreach. While "an officer on the street might not be able to tell" whether an offense is jailable or punishable only by a fine, "anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate's review of probable cause within 48 hours …." *Atwater*, 532 U.S. at 348, 352; *see County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). And this Court had "no reason to think" that a magistrate will not promptly order a person released if there is no legal basis for holding him or her. *Atwater*, 532 U.S. at 352. Of course, if that person is released only after a strip search or strip searched after release is ordered, the magistrate's role is cold comfort indeed.

Atwater is on all fours with other cases emphasizing the magistrate's role in checking executive overreach. The magistrate provides "one of the most fundamental distinctions between our form of government, where officers are under the law, and

the police-state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948); *see also, e.g., Gerstein v. Pugh*, 420 U.S. 103, 114–16 (1975) ("When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty."). And as *Atwater* recognizes, independent review is particularly important for minor offenses that are frequently dismissed and rarely lead to a sentence of incarceration. *See also Florence*, 132 S. Ct. at 1524 (Alito, J., concurring).

But under the Eleventh Circuit's rule, a magistrate provides no protection from a strip search. Under the Jail's policy, which the Eleventh Circuit endorsed as compliant with the Fourth Amendment, a person can be arrested for a minor offense and strip searched before a magistrate reviews his case—or strip searched even after a magistrate orders that he be released. To justify a strip search, a jailor need only choose, for any reason and under any circumstances, to put a person into general population.

By eviscerating the magistrate's role, the Eleventh Circuit's *per se* rule exposes vast swaths of the population to a risk of a grave deprivation of personal privacy and individual dignity. Under *Atwater*, millions of ordinary American citizens are subject to arrest virtually any day for commonplace offenses like speeding, jaywalking, failing to wear a seatbelt, improper honking, distracted driving, failing to signal a turn, or illegal parking. And more

could be arrested under a vast and arcane web of federal, state, and municipal regulations. Overall, more than 13 million people are arrested each year. *Florence*, 132 S. Ct. at 1515. Nearly a third of Americans are arrested by age 23. Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. Times, Dec. 19, 2011, at A16 (citing U.S. Dep't of Labor, Bureau of Labor Statistics, NLSY97, *National Longitudinal Study of Youth* (1997)). In 2002, 16.8 million Americans were stopped for traffic infractions. U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 211471, *Characteristics of Drivers Stopped by Police, 2002* at 1 (2006). Hundreds of thousands of people who are stopped will be arrested. *E.g.,* U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 234599, *Contacts Between Police and the Public, 2008* at 11, Table 16 (2011) (454,000 arrests in 2008). And although arrests for truly trivial offenses are unusual, they are not unheard of.[5]

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[5] *E.g., Hedgepeth v. WMATA*, 386 F.3d 1148 (D.C. Cir. 2004) (eating a French fry on the DC metro); Associated Press, *Musician Jailed After Performance in MARTA Station*, OnlineAthens (May 15, 2013), http://bit.ly/15NYAMh (playing violin in the Atlanta metro); *Lorenzo v. City of Tampa*, 259 Fed. App'x 239 (11th Cir. 2007) (distributing handbills without a license); *Shipp v. Bucher*, No. 07–cv–440, 2009 WL 179668 (M.D. Fla. Jan. 26, 2009) (dropping a lit cigarette); Joe Carr, *Welcome, baseball fan. Go directly to jail.* Wash. Post, June 21, 2013 (selling extra tickets to a baseball game); Heritage Foundation, *USA vs. You: The Flood of Criminal Laws Threatening Your Liberty* (2013) (collecting examples of regulatory offenses).

A *per se* rule allowing strip searches of all arrestees, without any protection from a magistrate, thus creates an unacceptable risk of extreme state overreach. For example, Petitioner Middleton was arrested in Atlanta on a warrant for an unpaid $27 traffic ticket. App. 39. Nonetheless, the Eleventh Circuit found that it was reasonable for him to be arrested, jailed, transferred to general population, and strip searched. Unfortunately, this is not an isolated example.[6]

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[6] In *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002), a woman was arrested in Atlanta and strip searched for honking her car horn when it was not an emergency. *Id.* at 1190–92. Sister Bernie Galvin—a nun—was strip searched following a warrantless arrest for trespassing at an antiwar demonstration. Br. of Sister Bernie Galvin et al. as *Amici Curiae* at *6, *Florence*, 132 S. Ct. 1510, 2011 WL 3017402; *see also, e.g., id.* at *9–10 (strip search following warrantless arrest for driving while license was inaccessible); *id.* at *13 (same and illegal left turn); *id.* at *12 (attending an outdoor party without a permit); *id.* at *14–15 (failing to disperse from a political protest). *See also, e.g., Archuleta v. Wagner*, 523 F.3d 1278, 1282 (10th Cir. 2008) (strip search of a woman after officers recognized that she had been mistakenly arrested on a warrant for somebody else); *Chapman v. Nichols*, 989 F.2d 393, 394–97 (10th Cir. 1993) (four women strip searched following warrantless arrests for driving with suspended license); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986) (warrantless arrest for falsely reporting an incident when police dispatcher told the woman to make the report); *Jones v. Edwards*, 770 F.2d 739, 740–42 (8th Cir. 1985) (refusing to sign a summons for a leash law violation); *Watt v. City of Richardson Police Dep't*, 849 F.2d 195, 196, 199 (5th Cir. 1988) (woman strip searched after arrest on a warrant for fine-only offense of failing to license a dog); *Walsh v. Franco*, 849 F.2d 66, 67–70 (2d Cir. 1988) (strip search after arrest for failing to appear in court for $5 parking violations; notice to

The notion that the state could arrest virtually any citizen for a commonplace offense and strip search him in front of a group of strangers—without any protection from a neutral magistrate and even when the neutral magistrate ordered him released—is contrary to the most basic constitutional principles. "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767. Indeed, the Fourth Amendment was enacted to stop the abuse of "general warrants," which provided "no judicial check" against executive overreach and instead "left to the discretion of the executing officials the decision as to which persons should be arrested and which places should be searched." *Steagald v. United States*, 451 U.S. 204, 220 (1981). Quite simply, our Constitution "does not leave us at the mercy of *noblesse oblige*." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010).

III. This Is A Good Vehicle To Address An Issue That Demands Prompt Review.

First, like many cases in this context, this one arises on a qualified immunity posture. But the Eleventh Circuit did not dismiss because the claimed

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appear sent to wrong address); *Stewart v. Lubbock Cnty., Tex.*, 767 F.2d 153, 154 (5th Cir. 1985) (blanket strip-search policy, including for fine-only misdemeanors); Br. for Pet'r at *11, *Florence*, 132 S. Ct. 1510, 2011 WL 2508902 (describing strip searches for "driving with a noisy muffler, failing to use a turn signal, and riding a bicycle without an audible bell").

right was not clearly established, as permitted by *Pearson v. Callahan*, 555 U.S. 223 (2009). Rather, the decisions below answer the constitutional question head on. The en banc court recognized that Respondent's conduct violated clearly established Eleventh Circuit precedent. *See* App. 65 (the panel "was bound" by *Wilson* to rule in Plaintiffs' favor). But the en banc court overruled that precedent and held squarely that the strip searches at issue were "constitutionally permissible." App. 61. The final panel opinion similarly held that "Plaintiffs have not shown a violation of their constitutional rights under the Fourth Amendment." App. 126. Accordingly, the constitutional question is squarely presented. *See Pearson*, 555 U.S. at 236 (deciding qualified immunity cases on the merits "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"); *Camreta v. Greene*, 131 S. Ct. 2020, 2032 (2011) ("[D]efining constitutional rights … is … beneficial to clarify the legal standards governing public officials.").

Second, the Eleventh Circuit relied on a *per se* rule to dismiss without any discussion of case-specific facts. The en banc court categorically held that "a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible." App. 61. And the final panel below

affirmed the grant of summary judgment without any discussion of the record evidence. It simply stated that "jailers do not violate detainees' Fourth Amendment rights by visually searching them for legitimate safety and penological reasons prior to admitting or readmitting them to the Jail's general population." App. 126. Accordingly, this is a good vehicle for deciding whether this *per se* rule is consistent with the Fourth Amendment.

Finally, this case is a good vehicle because it allows immediate correction of a deeply flawed *per se* rule that should not be allowed to stand. Some issues lend themselves to "percolation" while courts assess the full implications of a Supreme Court decision or a circuit split deepens. This is not one of those issues. Under the *per se* rule embraced as Fourth-Amendment compliant by the decisions below, innocent individuals can be arrested, strip searched before appearing before a neutral magistrate, and strip searched again even after the magistrate has confirmed their innocence. That result cannot stand. The millions of people who live in and travel through the Eleventh Circuit should not be subject to such a regime while other courts sort through the nuances of *Florence*.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

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July 19, 2013

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16734

C. ALAN POWELL, individually, and on behalf of all others similarly situated; TORY DUNLAP, individually, and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellees
Cross-Appellants,

v.

SHERIFF JACQUELINE BARRETT, Fulton County, State of Georgia; SHERIFF MYRON FREEMAN, Fulton County, State of Georgia, et al.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States
District Court for the Northern District of Georgia
D.C. Docket No. 04-01100-CV-RWS-1

August 23, 2007

OPINION

Before BLACK and HULL, Circuit Judges, and RYSKAMP,[*] District Judge.

BLACK, Circuit Judge:

* * *

[table of contents omitted
in the printing of this appendix]

Plaintiffs, 11 male former detainees at the Fulton County Jail (the Jail), filed a putative class action under 42 U.S.C. § 1983 against the former and current sheriffs of the Jail (the Sheriffs), Fulton County (the County), the members of the Fulton County Board of Commissioners (the Board), and the City of Atlanta (the City) (collectively, Defendants).[1] In their Fourth Amended Complaint (the Complaint), Plaintiffs claim their constitutional rights were violated when they were subjected at the Jail to "blanket strip searches," or strip searches without an individualized finding of reasonable suspicion that each Plaintiff was concealing weapons, drugs, or other contraband. Defendants filed motions to dismiss the Complaint for failure to state a claim, arguing, *inter alia*, the Sheriffs were entitled to both Eleventh Amendment immunity and qualified immunity and the County and City lacked the requisite control over the policies at the Jail to be liable as municipalities under § 1983. In an order

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[*] Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

[1] Plaintiffs also brought state law negligence claims against the Sheriffs. Those claims are not before us on appeal.

dated July 5, 2005 (the Order), the district court granted in part and denied in part Defendants' motions to dismiss.[2] In this appeal and cross-appeal, the parties challenge the district court's Order. After hearing oral argument, considering the parties' briefs, and reviewing the pertinent record, we affirm in part, reverse in part, and remand in part.[3]

I. BACKGROUND

In the Complaint, Plaintiffs sue former Sheriff Jacqueline Barrett in her individual capacity, current Sheriff Myron Freeman in his official and individual capacities, the County, the Board,[4] and the City. Plaintiffs seek both monetary damages and

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[2] The district court's July 5, 2005 order relies, in part, on a previous order dated January 13, 2005, in which the district court addressed the County's and City's motions to dismiss the First Amended Complaint. We include in this opinion the pertinent analysis from the January 13, 2005 order.

[3] In their Complaint, Plaintiffs also claim their constitutional rights were violated when they were detained past midnight on their scheduled release dates, or "overdetained." The district court granted in part and denied in part Defendants' motions to dismiss the overdetention claims. We address the district court's orders on the overdetention claims in a separate, unpublished opinion.

[4] Plaintiffs name the members of the Board as defendants in their Complaint. Although Plaintiffs have expressed their intent to dismiss their suit against the Board, it appears Plaintiffs have not yet done so. Nonetheless, because the parties do not treat the County and the Board separately in their briefs, we, like the district court, treat the County and the Board as one in our discussion of municipal liability.

injunctive relief against Defendants.[5] Plaintiffs challenge the blanket strip searches at the Jail on behalf of three putative classes: the Arrestee Strip Search Class (AR Group), Alpha Strip Search Class (AL Group), and Court Return Strip Search Class (CR Group).[6] Although the Complaint contains a chart showing the Plaintiffs included in each strip search group, there are some discrepancies between the chart and the allegations in the Complaint. The chart that appears in the appendix to this opinion is consistent with the allegations in the Complaint, and we rely on the appended chart for purposes of our opinion. As shown in the chart, the Plaintiffs and their respective strip search groups are as follows: C. Alan Powell (AR and AL Groups),[7] David Evans (AR and CR Groups), Stanley Clemons (AR Group), Allen

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[5] Although the Complaint is not entirely clear, it appears Plaintiffs seek injunctive relief specifically against the County, the City, and Sheriff Freeman in his official capacity.

[6] Because these classes have not yet been certified by the district court, we refer to them as "groups" throughout the opinion, and we use the names assigned to each putative class in the Complaint.

[7] C. Alan Powell is a Plaintiff for both the AR Group and AL Group. According to the Complaint, Powell was arrested on March 20, 2004 on charges of "disorderly conduct" and "not paying a bar tab." On March 21, 2004, someone posted bond for Powell. Before being released, Powell was strip searched. This strip search is the basis of Powell's involvement in the AL Group. At some point after Powell was released, his bond was revoked. On May 20, 2004, he was re-arrested and booked back into the Jail on the same charges following revocation of his bond. Upon booking, he was strip searched. This second strip search is the basis of Powell's involvement in the AR Group.

Middleton (AR Group), Anthony Westbrook (AR Group), Benjamin Blake (AR Group), Harry Witherspoon (AR Group), Antionne Wolf (AR and CR Groups), and Kristopher Alan Matkin (AL Group).[8] Plaintiffs identify three types of blanket strip searches[9] they contend violated their Fourth and Fourteenth Amendment rights: (1) blanket strip searches of arrestees as part of their point-of-entry booking into the Jail (AR Group); (2) blanket strip searches of detainees who posted bond or were ordered released at the Jail before their point-of-entry booking into the Jail was started or completed (AL Group); and (3) blanket strip searches of detainees who return from a court appearance after having been ordered released in state court (CR Group).[10]

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[8] Two of the eleven plaintiffs in this case, Tory Dunlap and Lee Antonio Smith, are notincluded in any of the strip search groups. Plaintiffs Dunlap and Smith only assert overdetention claims against Defendants.

[9] The Complaint states that "[b]lanket strip search means a strip search conducted without any determination of whether a basis to conduct the search exists." Thus, as used in this opinion, "blanket strip search" is a strip search without an individualized finding of reasonable suspicion that each Plaintiff was concealing weapons, drugs, or other contraband.

[10] Plaintiffs challenge the constitutionality of the strip searches only under the Fourth Amendment, as made applicable to the states by the Fourteenth Amendment. *See United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002). Plaintiffs do not contend in their briefs that the strip searches violated rights arising independently under the Due Process Clause of the Fourteenth Amendment. Further, under the law of this Circuit, we analyze the constitutionality of a strip search conducted without reasonable suspicion under the Fourth

We first summarize the factual allegations in the Complaint as they pertain to each group. We then explain the claims against the various Defendants and summarize the district court's rulings on those claims.

A. Factual Allegations in the Complaint Concerning the Jail's Strip Search Policy

1. Strip Searches as part of Point-of-Entry Booking into the Jail (AR Group)

According to the Complaint, there is a policy at the Jail whereby every male arrestee "booked"[11] into the Jail's general population upon entering the Jail, regardless of the crime for which he is arrested, is subjected to a strip search without an individualized finding of reasonable suspicion that the arrestee is concealing weapons, drugs, or other contraband. Each male arrestee is placed in a room with a group of 30 or 40 other persons, removes all of his clothing and places it in boxes, and, along with the group, takes a shower.[12] Each arrestee then either by

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Amendment. *See Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 969 n.6 (11th Cir. 2002). We therefore apply Fourth Amendment standards in addressing the constitutionality of the strip searches at issue here.

[11] Plaintiffs use the term "booked" to refer to the process during which a person committed to the Jail is fingerprinted, identified, and entered into the Jail's computerized inmate management system. Plaintiffs explain that blanket strip searches are also a part of the booking process.

[12] Because there are no factual allegations in the Complaint regarding female arrestees, we refer to Plaintiffs hereinafter as "arrestees" without reference to gender.

himself or standing in line with others is visually inspected front and back by deputies. The booking strip search process is referred to as "dressing out." The AR Group Plaintiffs allege they were subjected to blanket strip searches as part of their point-of-entry booking into the Jail.

2. Strip Searches after Becoming Entitled to Release at the Jail (AL Group)

According to the Complaint, the Jail's inmate management system is so inefficient that many persons committed to the Jail either post bond (or have someone post it for them) or are ordered released at First Appearance hearings at the Jail before their point-of-entry booking into the Jail has been started or completed.[13] Because these detainees were not booked immediately upon entering the Jail, they are subjected to the booking process–including the booking strip searches–*after* posting bond or having been ordered released at the Jail. Plaintiffs allege that, as a result, there is a practice of subjecting detainees who are to be released to booking strip searches before they are released from the Jail.[14] The AL Group Plaintiffs allege they were

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[13] Although Plaintiffs' allegations state that the AL Group Plaintiffs are released either at the Jail or at one of the courthouses, the two AL Group Plaintiffs never left the Jail. C. Alan Powell was released after his family posted bond for him, and Kristopher Alan Matkin was ordered released by a judicial officer at the Jail.

[14] While Plaintiffs allege that "many"—as opposed to "all"—detainees who have posted bond or have been ordered released by a judicial officer at the Jail are subjected to booking strip searches, we nonetheless construe the Complaint as alleging a

subjected to booking strip searches after having posted bond, in the case of Powell, or having been ordered released at a First Appearance hearing at the Jail, in the case of Matkin. It is not clear why Jail officials included the strip searches as part of the late booking process for the AL Group Plaintiffs given that they were to be released. However, we assume the AL Group Plaintiffs were strip searched because they were placed into the Jail's general population, where they were held while the staff in the Records Room checked for other detention orders, warrants, or holds and processed their release.

3. Strip Searches upon Returning from Court Appearance (CR Group)

Further, Plaintiffs allege the Jail has a policy whereby detainees who have been ordered released by a judge in state court are returned to the Jail following their court appearance instead of being released from the courthouse. Upon their return to the Jail, these detainees are subjected to blanket strip searches and booked back into the Jail's general population while the Record Rooms staff checked for other warrants or holds and processed their release.[15]

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policy or practice with respect to the AL Group strip searches. Plaintiffs refer to it as a "practice" in other parts of the Complaint.

[15] Again, while Plaintiffs allege that "many"—as opposed to "all"—detainees who are returned to the Jail following a court appearance are subjected to strip searches, we nonetheless construe the Complaint as alleging a policy or practice with respect to the CR Group strip searches. Plaintiffs refer to it as a "policy" in other parts of the Complaint.

The CR Group Plaintiffs, Evans and Wolf, allege they were subjected to blanket strip searches upon returning to the Jail after their court appearances. Unlike the AL Group Plaintiffs, the CR Group Plaintiffs were immediately booked upon entering the Jail and thus were already strip searched once before.[16] The CR Group Plaintiffs allege that, while in transit to and from the Jail and while at the courthouse, they were under constant supervision and were not permitted to have contact with anyone other than the Sheriff's deputies and their attorneys. According to the Complaint, the detainees' visits with their attorneys while at the courthouse were "subject to supervision by the Fulton County Sheriff's deputies."

B. Section 1983 Claims based on the Jail's Strip Search Policy

Plaintiffs assert § 1983 claims against Defendants based on the Jail's policies of conducting: (1) blanket strip searches of arrestees as part of their point-of-entry booking into the Jail (AR Group); (2) blanket strip searches of detainees who posted bond or were ordered released at the Jail before their point-of-entry booking into the Jail was started or completed (AL Group); and (3) blanket strip searches of detainees who return from a court appearance

[16] Based on Plaintiffs' allegations that every person booked into the Jail is strip searched, we must assume that because the CR Group Plaintiffs have been "booked" into the Jail, they have already been strip searched once.

after having been ordered released in state court (CR Group).[17]

1. Claims against the Sheriffs

The AR, AL, and CR Groups assert § 1983 claims against the Sheriffs in Counts 1, 5, and 9 of the Complaint, respectively. Plaintiffs allege the Sheriffs knew of the strip search policies at the Jail and acquiesced in the strip searches. According to Plaintiffs, the Sheriffs' failure to act was the "moving force" behind the constitutional violations and, by maintaining or acquiescing in the strip search policies, the Sheriffs were deliberately indifferent to the risk of constitutional injury.

2. Claims against the County and the Board

The AR, AL, and CR Groups assert § 1983 claims against the County and the Board in Counts 3, 7, and 11 of the Complaint, respectively. Plaintiffs allege the County and the Board had "ultimate authority" over the Jail, failed to adequately fund and staff the

[17] Plaintiffs challenge the constitutionality of the strip searches only under the Fourth Amendment, as made applicable to the states by the Fourteenth Amendment. *See United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002). Plaintiffs do not contend in their briefs that the strip searches violated rights arising independently under the Due Process Clause of the Fourteenth Amendment. Further, under the law of this Circuit, we analyze the constitutionality of a strip search conducted without reasonable suspicion under the Fourth Amendment. *See Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 969 n.6 (11th Cir. 2002). We therefore apply Fourth Amendment standards in addressing the constitutionality of the strip searches at issue here.

Jail and the County's criminal justice network, and failed to train the Sheriffs and their staff.

According to Plaintiffs, the County and the Board have authority to "maintain and operate facilities for the detention, incarceration or confinement of all persons subject to confinement under the laws of the state, any county resolution, or any city ordinance." They claim the County exercised its authority when it built the current Jail. According to Plaintiffs, the Board has the power to designate the person who controls the County's incarceration facilities, and the Board has designated the sheriff as the person who operates and controls the Jail. Plaintiffs allege, therefore, that "the Board, not the sheriff, has ultimate control" over the Jail.

Plaintiffs also allege the County, through the Board, sets the budget for the Jail; administers the Fulton County Civil Service System, which governs all county employees, including deputies, Records Room staff, and other Jail staff; maintains a unified pension system for all county employees, including the sheriff and the sheriff's staff; and supervises the sheriff's duties to hire, discipline, and fire Jail employees, as well as the sheriff's duties to formulate, implement, and execute "policies concerning the operation of the Fulton County Jail facilities subject to the authority of the Board." Lastly, Plaintiffs allege the Board controls and operates the Fulton County Police Department, which transports the individuals it arrests to the Jail for confinement.

Plaintiffs allege the County and the Board "knew or should have known" of the illegal strip searches at the Jail and were "deliberately indifferent" to the rights of Plaintiffs to be free from such strip searches. Plaintiffs claim the County's and the Board's "deliberate indifference" was the "motivating factor" of Plaintiffs' injuries.

3. Claims against the City

The AR, AL, and CR Groups assert § 1983 claims against the City in Counts 4, 8, and 12 of the Complaint, respectively. Plaintiffs allege the City has control over the Atlanta Police Department's policy of charging persons arrested within the municipality with either municipal or state offenses and over where to incarcerate those persons, even those charged with state offenses.

Specifically, Plaintiffs state that, prior to January 1, 2003, the Atlanta Police Department committed all persons it arrested, even those it charged with state offenses, to a City of Atlanta detention facility instead of the County Jail. The City detained and assumed responsibility for conducting probable cause hearings for all persons its officers arrested, whether the persons were arrested on state or municipal charges. Persons arrested for state offenses for whom probable cause was found were then transferred to the Jail. However, many of the persons arrested for state offenses had their charges reduced to municipal offenses at their probable cause hearings, and thus many arrestees were never transferred to the County Jail.

Plaintiffs allege that during 2002, the mayor developed–and the city council approved–a new policy to "save money for the City." As of January 1, 2003, the City ceased its policy of committing persons arrested within the municipality to an Atlanta detention facility and holding their First Appearance hearings there. Instead, under the new policy, the Atlanta Police Department began charging all arrestees with state offenses, whenever possible, and committing those persons directly to the Jail, instead of detaining them in the City detention facility as they had previously done.

According to Plaintiffs, the City knew or should have known the Jail had a custom and policy of subjecting the AR, AL, and CR Group Plaintiffs to illegal blanket strip searches and still chose to change its policy. Plaintiffs allege the City was "deliberately indifferent" to the rights of Plaintiffs, and its deliberate indifference was the "moving force" behind Plaintiffs' injuries.

C. District Court's Order

In its Order, the district court addressed Defendants' motions to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Powell v. Barrett*, 376 F. Supp. 2d 1340 (N.D. Ga. 2005).

In response to the Sheriffs' motion to dismiss, the district court first determined Sheriff Freeman functions as an arm of the State and, therefore, is entitled to Eleventh Amendment immunity from claims against him in his official capacity seeking

monetary damages. *Id.* at 1345-46. The district court relied on this Court's decisions in *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), and *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005), where we stated that a sheriff "functions as an arm of the State—not [the] County—when promulgating policies and procedures governing conditions of confinement at the [ ] County Jail." *Powell*, 376 F. Supp. 2d at 1345 (alterations in original). The district court clarified, however, that the Eleventh Amendment did not foreclose Plaintiffs from seeking prospective, injunctive relief against Sheriff Freeman in his official capacity.

The district court also determined the Sheriffs were entitled to qualified immunity from Plaintiffs' strip search claims for monetary damages against the Sheriffs in their individual capacities. *Id.* at 1346-50. After assuming Plaintiffs had sufficiently alleged constitutional violations, the district court determined that Plaintiffs' right to be free from blanket strip searches was not clearly established. *Id.* at 1346 n.3, 1349. The district court analyzed this Court's decisions in *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), and this Court's panel and en banc decisions in *Evans v. City of Zebulon,* 351 F.3d 485 (11th Cir. 2003), *vacated by* 364 F.3d 1298 (11th Cir. 2004), and *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (*Evans I* and *Evans II*, respectively). *Id.* at 1347-50. It found that because this Circuit had "perceive[d] room to debate the

contours of this constitutional right," the Sheriffs could not justifiably be charged with having fair warning that conducting strip searches absent reasonable suspicion violated the law. *Id.* at 1349. Accordingly, the district court dismissed the strip search claims against the Sheriffs in their individual capacities. *Id.* at 1350.

In response to the County's and City's motions to dismiss, the district court agreed the County and the City lacked the requisite control over the strip search policies at the Jail to be liable under § 1983 for such policies.[18] The district court explained that, with respect to the City, Plaintiffs failed to advance any allegation that the City "controlled" or was "actually responsible for" the strip search practices at the Jail. With respect to the County, the district court found the County could not be held liable for the strip search practices at the Jail under *Grech* and *Manders*, explaining that a Georgia sheriff acts as an arm of the state in his or her corrections and detainee-oversight roles and the County lacks any meaningful authority to direct the sheriff's actions in those regards. Further, the district court rejected Plaintiffs' argument that three "local constitutional amendments" applicable only to Fulton County gave the County control over the operation of the Jail and

[18] The district court first addressed the County's and City's liability in its January 13, 2005 order. In their motions to dismiss the Complaint, the County and City requested the district court reconsider, or, alternatively, clarify its January 13, 2005 holding regarding their potential liability under § 1983. The district court denied the request for reconsideration, but granted the request for clarification.

treatment of detainees at the Jail. The district court explained that it found nothing in the amendments or the Fulton County Code reflecting the Board's *exercise* of any potential authority granted by the amendments. Additionally, it found the amendments did not give the County the authority to direct the policies of the Sheriffs, nor did they alter the established allocation of power between the Sheriffs and County with respect to corrections.

The district court nonetheless concluded Plaintiffs had stated a claim against the County and the City insofar as Plaintiffs alleged the County and the City, through their respective police forces, maintained a policy of placing their respective arrestees in the Jail with knowledge of the Jail's unconstitutional practices. According to the district court, in addition to the policies at the Jail, Plaintiffs had identified another "proximate 'moving force'" behind their alleged constitutional violations, namely, the County's and City's policies of placing their arrestees at the Jail. The district court found that, because Georgia law suggests the County and the City *do* control where their respective police departments place arrestees, the County and the City could face § 1983 liability for these policies. Accordingly, the district court denied the County's and City's motions to dismiss. *Id.* at 1356, 1360.

II. DISCUSSION

On appeal, the County and the City maintain they cannot be held liable under § 1983 for their policies of placing arrestees at the Jail. They argue that because they do not control the policies at the

Jail, Plaintiffs' claims against them must be dismissed.

On cross-appeal, Plaintiffs contend the district court erred in determining Sheriff Freeman is entitled to Eleventh Amendment immunity because, under three local constitutional amendments applicable to Fulton County, the County operates the Jail and thus the Sheriff acts for the County rather than the State of Georgia.[19] Plaintiffs also cross-appeal the district court's determination that the Sheriffs are entitled to qualified immunity from the strip search claims against them in their individual capacities. Plaintiffs argue their constitutional rights to be free from blanket strip searches was clearly established at the time they were strip searched at the Jail.

We must determine, therefore, whether (1) Sheriff Freeman is entitled to Eleventh Amendment immunity from Plaintiffs' strip search claims for monetary damages against him in his official capacity; (2) Sheriff Barrett is entitled to

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[19] Alternatively, Plaintiffs contend that Sheriff Freeman is not entitled to Eleventh Amendment immunity because suing him in his official capacity amounts to suing the Sheriff's office, which is neither an arm of the County nor an arm of the State but is instead an independent entity. Plaintiffs did not raise this argument before the district court, however, arguing only that Sheriff Freeman acts for Fulton County and not as an arm of the State. We therefore decline to consider whether the sheriff's office is independent from both the County and the State. *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1366 n.2 (11th Cir. 2006) ("[A]n argument made for the first time in the court of appeals is generally waived."); *see also Manders*, 338 F.3d at 1328 n.54.

qualified immunity from Plaintiffs' strip search claims for monetary damages against her in her individual capacity;[20] and (3) the County and City are subject to municipal liability under § 1983 for Plaintiffs' strip search claims.

We note at the outset that we have jurisdiction to consider the issues raised on both appeal and cross-appeal pursuant to 28 U.S.C. § 1292(b). Section § 1292(b) permits this Court to review a district court order not otherwise appealable as an interlocutory decision if the district court certifies that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The district court certified the issues addressed in its Order for immediate appeal in an order dated August 1, 2005. Defendants timely petitioned and Plaintiffs timely cross-petitioned this Court for permission to appeal

[20] Defendants claim Plaintiffs lack standing to sue Sheriff Freeman in his individual capacity because the allegations in the Complaint show that all Plaintiffs were released from the Jail before Sheriff Freeman took office. We agree and remand to the district court to dismiss Plaintiffs' strip search claims for monetary damages against Sheriff Freeman in his individual capacity. Thus, we address qualified immunity only with respect to the strip search claims for monetary damages against Sheriff Barrett in her individual capacity.

the Order, and we granted the petitions on December 8, 2005.[21]

We review the district court's rulings on a motion to dismiss for failure to state a claim *de novo*, accepting all factual allegations as true and construing them in the light most favorable to the plaintiff. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003); *see also Ass'n for Disabled Americans, Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 956 (11th Cir. 2005) (applying *de novo* standard to district court's grant of a motion to dismiss based upon Eleventh Amendment immunity); *Dalrymple v. Reno,* 334 F.3d 991, 994 (11th Cir. 2003) (applying *de novo* standard to district court's decision to grant or deny the defense of qualified immunity on a motion to dismiss). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1964-65 (2007) (citations and internal quotations omitted). A complaint is subject to dismissal under Rule 12(b)(6) when the allegations in the complaint, on their face, show that an affirmative defense bars recovery on the claim. *Marsh v. Butler County*, 268 F.3d 1014, 1022 (11th Cir. 2003) (en banc).

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[21] The district court's certification and this Court's grant of permission to appeal also included the issues addressed in the district court's January 13, 2005 order.

A. Eleventh Amendment Immunity from Suit in Official Capacity

We first address whether Sheriff Freeman is entitled to Eleventh Amendment immunity from Plaintiffs' strip search claims for monetary damages against him in his official capacity. "The Eleventh Amendment protects a State from being sued in federal court without the State's consent." *Manders*, 338 F.3d at 1308. The Eleventh Amendment also bars suits brought in federal court against a defendant acting as an "arm of the State." *Id.* To determine whether a defendant is an "arm of the State," this Court examines the four factors enumerated in *Manders*: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Id.* at 1309. The factors must be considered "in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Id.* at 1308. Further, our determination is dependent on the law of the state in which the sheriff operates, since "states have extremely wide latitude in determining their forms of government and how state functions are performed." *Id.* at 1309 n.10. Accordingly, at issue in the instant case is whether, under Georgia law, Sheriff Freeman acted as an arm of the State in promulgating policies and procedures to maintain security at the Jail for the safety of detainees, visitors, and jail personnel, through the Jail's strip search policy.

In *Manders*, this Court addressed whether the sheriff of Clinch County, Georgia, was an arm of the State with respect to his "force policy at the jail and the training and disciplining of his deputies in that regard." *Id.* at 1308-09. Recognizing that resolution of the issue depended in part on state law, we discussed the relationship among the sheriff, the State, and Clinch County under Georgia law. *Id.* at 1309-18. Because the instant case also involves the relationship of a Georgia sheriff with the county in which he operates and the State, we rely on the pertinent discussion of Georgia law in *Manders*.

In *Manders*, we noted:

> Georgia's Constitution grants the State legislature the exclusive authority to establish and to control a sheriff's powers and duties. Interpreting this constitutional provision, the Georgia Supreme Court has explained that sheriffs are subject to the control of the Georgia legislature and are *not* county employees. . . .
>
> In contrast to the State's authority and control over sheriffs, Georgia's Constitution grants counties no legislative power or authority over sheriffs and expressly prevents counties from controlling or affecting the sheriff's office or the personnel thereof. In this regard, the Georgia Supreme Court has concluded that this constitutional restriction on the legislative power granted to counties—home rule—prevents counties

> from taking action affecting the sheriff's office. . . .
>
> Further, in Georgia, counties also do not delegate any of their governmental or police powers to sheriffs. Instead, the sheriffs' authority and duties are derived directly from the State. . . .
>
> Georgia law likewise makes the county entity itself, here Clinch County, a separate entity independent of the sheriff's office. . . . As a separate entity, Clinch County is headed by its Board of Commissioners, which is given "exclusive jurisdiction over and control of county affairs." In contrast, under Georgia's Constitution, the State has exclusive authority and control over the duties and affairs of the sheriff's office. Although the State requires the county to fund the sheriff's budget, Georgia's Constitution precludes the county from exercising any authority over the sheriff, including how the sheriff spends that budget.

Id. at 1310-11 (emphasis in original) (citations omitted); *see also Bd. of Comm'rs of Dougherty County v. Saba,* 598 S.E.2d 437, 439 (Ga. 2004) ("The sheriff is an elected constitutional officer and not an employee of the county commission."); *Bd. Of Comm'rs of Randolph County v. Wilson*, 396 S.E.2d 903, 903 (Ga. 1990) (same).

With this brief summary of the relationship between the State, the sheriff, and the County, we

turn to the four factors in *Manders*. Although *Manders* analyzed the four factors in light of a sheriff's use-of-force policy, *see Manders,* 338 F.3d at 1305, we determine that the analysis in *Manders* is applicable to Sheriff Freeman's function of maintaining security at the Jail. And, guided by *Manders*, we conclude the factors weigh in favor of finding that Sheriff Freeman is an arm of the State in performing this function. *See Purcell,* 400 F.3d at 1325-26 (11th Cir. 2005) (finding, in a suit against the sheriff of Toombs County, Georgia for failure to prevent inmate-on-inmate violence, the sheriff acts as an arm of the State "when promulgating policies and procedures governing conditions of confinement at the Toombs County Jail").[22] We briefly analyze the four factors below.

1. Eleventh Amendment Factors

a. How state law defines the sheriff's office

The sheriff's office is a "separate and independent office" from the county and its governing body, notwithstanding that the sheriff is elected by county voters. *Manders*, 338 F.3d at 1319; *Brown v.*

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[22] *Compare Brown v. Dorsey*, 625 S.E.2d 16, 21 (Ga. Ct. App. 2005) (finding that, for purposes of municipal liability under § 1983, the sheriff of Dekalb County, Georgia, did not act as final policymaker for the county when using departmental personnel and resources to commit a murder and thus the county could not be liable for the sheriff's actions under § 1983), *with Freeman v. Barnes*, 640 S.E.2d 611, 615-16 (Ga. Ct. App. 2006) (finding that the sheriff is a county official for workers' compensation purposes).

Dorsey, 625 S.E.2d 16, 21 (Ga. Ct. App. 2005) ("[T]he Constitution has made the sheriff independent from the County, notwithstanding the designation of the sheriff as a 'county officer.'"). The essential governmental nature of the sheriff's office is to (1) enforce the law and preserve the peace on behalf of the State and (2) perform specific statutory duties, *directly assigned by the State*, in law enforcement, state courts, and corrections. *Manders*, 338 F.3d at 1319. With respect to corrections, in particular, the State requires the sheriff to take custody of pre-trial detainees charged with state felony and misdemeanor offenses.[23] *Id.* at 1315. The State also charges the sheriff with providing for the protection and well-being of the detainees in his custodial care. *Mayo v. Fulton County*, 470 S.E.2d 258, 259 (Ga. Ct. App. 1996).[24] Thus, in performing his State-assigned function of maintaining security at the Jail, Sheriff Freeman acted for the State. Based on *Manders*, therefore, we conclude the first factor weighs in favor of immunity.

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[23] Under O.C.G.A. 42-4-12, the sheriff has a duty to accept persons charged with an indictable offense, and by implication, a right to refuse to receive any municipal prisoner who is not charged with an offense against the State. *Tate v. Nat'l Sur. Corp.*, 200 S.E. 314, 315 (Ga. Ct. App. 1938). In the instant case, although some of the Plaintiffs were arrested by the Atlanta Police Department, we assume based on Plaintiffs' allegations that they were all charged with state offenses.

[24] We note, as we did in *Manders*, that this is not a case of feeding, clothing, or providing medical care to inmates, which are matters over which Fulton County does have obligations and which are therefore county functions. *Manders*, 338 F.3d at 1319, 1322.

b. Where state law vests control

The State requires, and funds, annual specialized training of sheriffs in law enforcement, investigation, judicial process, and corrections practices. *Manders,* 338 F.3d at 1320. It is reasonable to assume that the State-mandated training in corrections includes instruction on maintaining security at the Jail and protecting the safety of detainees and others at the Jail. If a sheriff fails to comply with the annual training requirements, the Governor—on behalf of the State—may sanction the sheriff for noncompliance. *Id.* at 1320. In fact, as we recognized in *Manders*, the Governor retains significant control over sheriffs:

> [T]he Governor has broad investigation and suspension powers regarding any misconduct by a sheriff in the performance of any of his duties. If a sheriff's policy permits excessive force in the county jail, plainly the Governor may discipline the sheriff. If a sheriff fails to take custody of state offenders in the county jail, plainly the Governor may discipline the sheriff. The State legislature expressly has made [the Sheriffs] answerable to the Governor for [their] conduct . . . .
>
> Specifically, the Governor may initiate an investigation of any suspected misconduct by any sheriff and may suspend the sheriff. . . . The State funds the investigation.

Id. at 1321 (citations omitted).

In contrast to the State's and Governor's authority over the sheriff's office, the counties have no authority or control over the sheriff's corrections duties. *See id.* at 1322. While Georgia counties have obligations regarding the jail structure and inmates' food, clothing, and medical necessities, those matters are "wholly separate and distinct" from the sheriff's policies governing strip searches and release of detainees at the Jail. *See id.* Given "the State's direct and substantial control over the sheriff's duties, training, and discipline and the county's total lack thereof," *id.*, we determine that the second factor also weighs in favor of immunity in this case.

c. Where the entity derives its funds

State funds are involved, to some extent, in the functions at issue here, including the annual training of sheriffs in corrections matters and in the Governor's disciplinary procedure over sheriffs for misconduct. *See id.* at 1323. While counties bear the major burden of funding the sheriff's office and county jail, they are required to do so by State law. *Id.* The State requires the County to pay for pre-trial state offenders, maintain the jail structure, provide necessities to inmates, and pay the salaries of the Sheriffs and their deputies. *Id.* at 1323 & n.42. Although the County sets and funds the sheriff's total budget, however, it cannot dictate how the sheriff spends that budget in the exercise of the Sheriffs' duties, including their duties to maintain security at the Jail. *See id.* at 1323; *see also McMillan v. Monroe County,* 520 U.S. 781, 791, 117 S. Ct. 1734, 1740 (1997) ("The county's payment of

the sheriff's salary does not translate into control over [the sheriff], since the county neither has the authority to change [the sheriff's] salary nor the discretion to refuse payment completely."); *Chaffin v. Calhoun*, 415 S.E.2d 906, 907-08 (Ga. 1992). Because both state and county funds are involved in the function at issue here, and because county funds are involved only by virtue of state law, we conclude the third factor weighs in favor of immunity. *See Manders*, 338 F.3d at 1324.

d. Liability for and payment of adverse judgments

Under Georgia law, "counties are not liable for, and not required to give sheriffs money to pay, judgments against sheriffs in civil rights actions." *Id.* at 1326. We noted in *Manders*, however, that while the counties would not be liable for judgments against the sheriffs, the State might not be liable either. *Id.* at 1327. We could not find a Georgia law that expressly required the State to pay an adverse judgment against the Sheriff in his official capacity. *Id.* We suggested, therefore, that the sheriff may have to pay a judgment against him out of his own budget. *Id.* This could, in turn, affect both state and county funds indirectly. *Id.* The situation in *Manders* with respect to the county's or state's liability for adverse judgments is the same as that in the instant case. Thus, we conclude, as did the *Manders* court, that the fourth factor, "at a minimum, . . . does not defeat Sheriff [Freeman's] immunity claim." *Id.* at 1328.

2. Local Constitutional Amendments

Plaintiffs maintain on appeal that three local constitutional amendments applicable only to Fulton County alter the "default" allocation of authority between a Georgia sheriff and the county established in *Manders*. In particular, Plaintiffs rely on the amendment they refer to as the "Jail Local Constitutional Amendment" (JLCA).[25] Plaintiffs contend that because the JLCA authorizes the County to "maintain and operate" detention facilities and designate a person to "control" those facilities,

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[25] The full text of the JLCA is as follows:

> The governing authority of Fulton County is hereby authorized to maintain and operate facilities within or without the boundaries of said County for the detention, incarceration or confinement of all persons (including juveniles) subject to detention, incarceration or confinement under the laws of this State, under any County resolution or under any City ordinance. Such facilities, whether designated as a jail, public works camp or detention center, shall be under the control of such person or official as may be designated by the governing authority of Fulton County, and need not be used exclusively for any one class of prisoner or person.

H.R. 687-1585, 1972 Sess., at 1439 § 1 (Ga. 1972), *continued in effect* in S. 503, 1986 Sess., at 4428 (Ga. 1986); *see also* Fulton County, Ga., Code § 1-122.

Plaintiffs also rely on two other constitutional amendments, which they refer to as the "Civil Service Local Constitutional Amendment" and the "Pension Local Constitutional Amendment." We agree with the district court that these amendments do not establish the requisite control on the part of the County to render the Sheriff a county actor.

the Sheriff acts for the County rather than as an arm of the State in operating the County's Jail.

We disagree. The three local amendments to which Plaintiffs draw our attention do not affect our reliance on *Manders*. We recognize that, in *Manders*, we stated in a footnote that a local act of the State legislature could give a Georgia county control over the county jail, such as a local act granting Chatham County control over its jail.[26] *Manders*, 338 F.3d at 1318 n.34. The Chatham County act explicitly gives the commissioners of Chatham County the power to make "rules and regulations" for the "government and control" of the Chatham County jail and inmates. Further, the Chatham County act affirmatively vests the commissioners with the "management and care" of the jail. By contrast, the JLCA does not give the County power to make rules and regulations for the administration of the Jail. Therefore, the JLCA does not alter the relationship among the State, the County, and the Sheriff, as the County continues to have no say in how the Sheriff implements his policies at the Jail. However, even if the JLCA altered the analysis in *Manders*, the County has not

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[26] The text of the local act giving Chatham County control over its jail is as follows:

> "Said Commissioners (of Chatham County) shall have power to make proper rules and regulations for the government and control of *said jail of Chatham County*, and the prisoners and inmates therein, and, except as hereinbefore provided, are hereby invested with the management and care of said jail." *Griffin v. Chatham County*, 261 S.E.2d 570, 572 (Ga. 1979) (emphasis added).

exercised any potential authority granted to it under the JLCA because the Sheriff, an office established by the State legislature, continues to control the Jail.

Under Georgia law, the office of sheriff carries with it all of its common-law duties and powers, except as modified by statute. *Elder v. Camp*, 18 S.E.2d 622, 625 (Ga. 1942). Where a statute limits the common-law duties and powers of a sheriff, it must be strictly construed, particularly where the limitation or restriction applies to only one sheriff in the State. *Warren v. Walton*, 202 S.E.2d 405, 409 (Ga. 1973). We cannot conclude the JLCA definitely and positively grants to the County the traditional powers allocated to the sheriff of a Georgia county, thereby altering the established allocation of power between the State, the County, and Sheriff Freeman. We therefore affirm the district court's determination that Sheriff Freeman is entitled to Eleventh Amendment immunity, and we dismiss Plaintiffs' claims against Sheriff Freeman in his official capacity to the extent Plaintiffs seek monetary damages.[27]

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[27] The Eleventh Amendment does not prevent Plaintiffs from seeking prospective, injunctive relief against Sheriff Freeman in his official capacity. *See Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 437, 124 S. Ct. 899, 903 (2004). Defendants maintain, however, that Plaintiffs lack standing to pursue prospective injunctive relief on their strip search claims against both Sheriff Freeman in his official capacity and against the City. We need only address Plaintiffs' standing to seek injunctive relief against Sheriff Freeman in his official capacity because we dismiss the strip search claims against the County and the City in section II.C. below. In order to meet the constitutional minimum for standing to seek injunctive relief, Plaintiffs must show they

"[have] sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102, 103 S. Ct. 1660, 1665 (1983) (internal quotations omitted). "[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* (internal quotations omitted). All Plaintiffs (other than Stanley Clemons) had been released from the Jail before they were added as parties to this suit. We agree with the district court that the threat they face of future unconstitutional strip searches is too speculative or conjectural and not real and immediate. *See, e.g., Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004) (finding the likelihood of plaintiff being subjected to unconstitutional strip search policy at correctional center after release is "too speculative and conjectural"). Further, although Clemons was still at the Jail at the time he was added as a plaintiff to this suit, he has since been released from the Jail, which moots his claim for relief. *See Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir. 1988) (holding that claims regarding treatment at a facility at which prisoner was no longer incarcerated were moot); *see also Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir.1985) (explaining that absent class certification, an inmate's claim for injunctive relief under § 1983 action is moot once the inmate has been transferred). Clemons does not meet the two conditions for the "capable of repetition, yet evading review" exception to apply: (1) the challenged action must be of too short a duration to be fully litigated prior to its cessation, and (2) a reasonable expectation must exist that the same complaining party will be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 348 (1975). While the first condition may be satisfied, the second is not because Clemons has not demonstrated a reasonable expectation that he will again be arrested, committed to the Jail, and unconstitutionally strip searched. Thus, we conclude Plaintiffs' claims for injunctive relief against Sheriff Freeman in his official capacity should be dismissed.

B. Qualified Immunity from Suit in Individual Capacity

We turn next to whether Sheriff Barrett is entitled to qualified immunity from Plaintiffs' strip search claims for monetary damages against her in her individual capacity. "Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). To receive qualified immunity, the government official first must prove he was acting within his discretionary authority when the alleged wrongful acts occurred. *Id.* Once the government official establishes he was acting within his discretionary authority, the burden shifts to the plaintiff to show the defendant is not entitled to qualified immunity. *Id.* The Supreme Court has established a two-part test to determine whether a defendant is entitled to qualified immunity. "The threshold inquiry a court must undertake . . . is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001)). If, under the plaintiff's version of the facts, the defendant violated a constitutional right, "the next, sequential step is to ask whether the right was clearly

established." *Saucier*, 533 U.S. at 201, 121 S. Ct. at 2156.

Sheriff Barrett is undisputedly a government official. Further, Plaintiffs do not dispute that Sheriff Barrett was acting within the scope of her discretionary authority in having Plaintiffs strip searched to maintain security at the Jail. Therefore, we consider only whether, with respect to the AR, AL, and CR Group Plaintiffs, Plaintiffs sufficiently alleged violations of constitutional rights and, if so, whether such rights were clearly established at the time of the alleged violations.

1. Constitutional Violation

a. Strip searches of AR Group Plaintiffs

We first address the constitutionality of the blanket strip searches conducted on the AR Group Plaintiffs as part of their point-of-entry booking into the Jail.[28] Plaintiffs allege each arrestee booked into the Jail's general population, regardless of the crime for which the person is arrested, is subjected to a blanket strip search without an individualized finding of reasonable suspicion that the person is concealing drugs, weapons, or other contraband. Under the law of this Circuit, an arrestee to be detained in the general jail population has a constitutional right under the Fourth Amendment to be free from strip searches conducted without reasonable suspicion that the detainee is concealing

[28] We note that, in the instant case, Plaintiffs do not challenge the *manner* of the strip searches.

weapons, drugs, or other contraband. *Wilson*, 251 F.3d at 1341, 1343 (plaintiff arrested for driving under the influence); *Skurstenis v. Jones*, 236 F.3d 678, 680, 682 (11th Cir. 2000) (plaintiff arrested for driving under the influence). Thus, under our binding precedent, the Jail's alleged policy of conducting blanket strip searches on all arrestees at booking, on the single ground they are to be placed in the Jail's general population, must be deemed unconstitutional. *See Wilson,* 251 F.3d at 1343; *Skurstenis*, 236 F.3d at 682.

Our holding with respect to the Jail's policy does not mean, however, that the particular strip search conducted on each AR Group Plaintiff actually violated that Plaintiff's Fourth Amendment rights. *Hicks v. Moore*, 422 F.3d 1246, 1251 (11th Cir. 2005); *Skurstenis*, 236 F.3d at 682. Reasonable suspicion may have existed to justify the searches of some Plaintiffs. *Id.* "'Whether an officer has reasonable suspicion is an objective question viewed from the standpoint of a reasonable [ ] officer at the scene. It is based on the totality of the circumstances, and is a question of law to be reviewed de novo.'" *Id.* at 1252 (quoting *Evans II*, 407 F.3d at 1280). In determining whether reasonable suspicion existed for the strip search, it is immaterial whether the specific arresting officer or jailer *actually and subjectively* had reasonable suspicion, or whether anyone at the time *actually* conducted a reasonable suspicion analysis. *Hicks*, 422 F.3d at 1252. Instead, our inquiry is whether, given the circumstances,

reasonable suspicion *objectively* existed to justify the search. *Id.*

Our precedent demonstrates that reasonable suspicion to justify the strip search of an arrestee may be based on, among other things, the circumstances of the person's arrest and/or the nature of the offense for which the person was arrested. First, we have recognized that the circumstances surrounding a person's arrest may support reasonable suspicion to justify a strip search upon booking into the jail. 236 F.3d at 682. For example, in *Skurstenis*, we held that "possession of a weapon by a detainee [at the time of arrest] provides the 'reasonable suspicion' necessary to authorize a strip search." *Id.* Although we noted the jail's policy of conducting blanket strip searches on arrestees before being placed in a cell or detention room was unconstitutional, we upheld the particular strip search conducted on the plaintiff because, at time of her arrest for driving under the influence, she had a handgun in her possession. *Id.*[29]

Second, we have recognized that "a person's being charged with a crime of violence is sufficient to evoke reasonable suspicion that the person may be concealing weapons or contraband." *Hicks*, 422 F.3d at 1252; *see also Masters v. Crouch*, 872 F.2d 1248,

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[29] At the time of her arrest for driving under the influence, "Skurstenis had a .38 special handgun, for which she had an expired permit, in the floorboard of her car." *Skurstenis*, 236 F.3d at 680. Skurstenis was arrested only for driving under the influence, however, and was not charged with any weapons offense. *See id.*

1255 (6th Cir. 1989). Similarly, where a person is arrested for an offense involving weapons or drugs–such as possession or use of a firearm and possession, use, or distribution of an illegal substance–it is objectively reasonable to conduct a strip search of that person before he comes into contact with other detainees. In such cases, the nature of the arrest charge itself, independent of the facts surrounding the arrest, gives rise to reasonable suspicion. On the other hand, where a person is arrested for an offense not generally associated with violence and not involving weapons or drugs, the single fact the arrestee will be placed in the general jail population is not sufficient justification for the search under our binding precedent. *See Hicks*, 422 F.3d at 1251-52. In such a case, there must be additional facts giving rise to reasonable suspicion that the person is concealing weapons, drugs, or other contraband, such as the circumstances surrounding the person's arrest, as in *Skurstenis*.

We have declined to draw a distinction between felonies and misdemeanors, recognizing there exist both felonies and misdemeanors that are crimes of violence or that involve weapons or drugs and whose nature, therefore, give rise to reasonable suspicion that the arrestee is concealing weapons, drugs, or other contraband. In *Hicks*, for example, a panel of this Court found that the misdemeanor offense of "family violence battery," for which the detainee was arrested and charged, justified the strip search conducted on the plaintiff. 422 F.3d at 1252. Because it was the first time the plaintiff had been arrested

for and charged with family violence battery, he was charged with a misdemeanor. *See id.* at 1249 n.2. Finding the offense was "obviously one of violence," the panel explained that Georgia law defined family violence battery as "'intentionally caus[ing] substantial physical harm or visible bodily harm' to a 'past or present spouse.'" *Id.* at 1252 (quoting O.C.G.A. § 16-5-23.1(a)). The panel reached its conclusion not by considering whether the arrest charge was a felony or misdemeanor, but by looking to the elements of the offense. *See id.* The panel determined that, although the arresting officers and jailers did not subjectively suspect the detainee of concealing weapons or drugs, the nature of the arrest charge (of which the jailers were notified) was sufficient to justify the strip search. *Id.* at 1249, 1252.

We stress that under *Hicks*, the question of whether an offense is a crime of violence depends not on the offense's classification as a felony or misdemeanor, but instead on the elements of the offense for which the arrestee was arrested and charged. Where the elements of the offense demonstrate that it is a crime of violence or a crime that involves weapons or drugs, the offense itself gives rise to reasonable suspicion to justify a strip search. Of course, even where the offense is not a crime of violence and does not involve weapons or drugs, the circumstances surrounding the arrest may nonetheless support reasonable suspicion that the arrestee is concealing weapons, drugs, or other contraband. *See Skurstenis*, 236 F.3d at 682.

In the instant case, there are no allegations about the circumstances surrounding the arrest of each AR Group Plaintiff. Accordingly, we can look only to the nature of the particular offenses for which the AR Group Plaintiffs were arrested to determine if their strip searches were supported by reasonable suspicion.

Based on the allegations in the Complaint, we conclude the following AR Group Plaintiffs were arrested for crimes of violence or crimes involving weapons or drugs: David Evans, arrested on a charge of disorderly conduct but transferred to the Jail on a warrant for possession of a weapon; Anthony Westbrook, arrested on a charge of simple battery;[30] and Benjamin Blake, arrested for battery.[31] Because the strip searches of these AR Group Plaintiffs were supported by reasonable suspicion based on the nature of the arrest offenses, the allegations do not establish a violation of their Fourth Amendment rights. We therefore affirm the dismissal of the strip search claims asserted by Plaintiffs Evans, Westbrook, and Blake.

We also conclude the following AR Group Plaintiffs were arrested for offenses that are not crimes of violence and do not involve weapons or drugs: C. Alan Powell, arrested after revocation of bond for "disorderly conduct" and failure to pay a

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[30] According to the Complaint, Anthony Westbrook also was arrested for "child abandonment (non-support)" and on a probation warrant for "forgery."

[31] According to the Complaint, Benjamin Blake also was arrested for "trespass" and "obstruction."

"bar tab"; Stanley Clemons, arrested on a charge of burglary;[32] Allen Middleton, arrested on a warrant for an "unpaid $27 traffic ticket"; Harry Witherspoon, arrested for "driving under the influence"; and Antionne Wolf, arrested for "contempt/nonpayment of child support." The strip searches of this latter group of AR Group Plaintiffs, as alleged in the Complaint, were not supported by reasonable suspicion based on the nature of the arrest offenses alone. Therefore, the allegations in the Complaint, at least at this Rule 12(b)(6) stage, establish a violation of the Fourth Amendment rights of Plaintiffs Powell, Clemons, Middleton, Witherspoon, and Wolf.[33] We must proceed to consider whether the rights of these AR Group Plaintiffs were clearly established.

Before doing so, however, we point out that a majority of our Court has expressed uncertainty about our precedent holding that strip searches of arrestees to be placed in the jail's general population, absent reasonable suspicion, violate the Fourth Amendment. *See Evans II*, 407 F.3d at 1278. In imposing a requirement of reasonable suspicion, our prior decisions relied on, but misconstrued, the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S.

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[32] We note that, in some circumstances, burglary may be a crime of violence. However, the allegations in the instant case are insufficient for us to make that determination.

[33] At the summary judgment stage, Defendants may show facts regarding the circumstances of each Plaintiff's arrest, the nature of the arrest offenses, or some other conduct that support reasonable suspicion. At this 12(b)(6) stage, however, we look only to the allegations in the Complaint.

520, 99 S. Ct. 1861 (1979). *See Wilson*, 251 F.3d at 1342-43; *Skurstenis*, 236 F.3d at 681-82; *Justice v. City of Peachtree City*, 961 F.2d 188, 193 (11th Cir. 1992). We have since recognized our misinterpretation of *Bell*, stating: "Most of us are uncertain that jailers are required to have a reasonable suspicion of weapons or contraband before strip searching—for security and safety purposes—arrestees bound for the general jail population. Never has the Supreme Court imposed such a requirement." *Evans II*, 407 F.3d at 1279 (citations omitted). Nonetheless, we recognize we are bound by our Circuit's prior panel decisions that a jail's general practice of conducting blanket strip searches on arrestees on the single ground that they will be placed in the jail's general population is unconstitutional under *Wilson* and *Skurstenis*.

For the reasons stated above, we affirm the district court's dismissal of the strip search claims asserted by Plaintiffs Evans, Westbrook, and Blake, concluding the allegations do not establish a violation of their Fourth Amendment rights. With respect to Plaintiffs Powell, Clemons, Middleton, Witherspoon, and Wolf, we conclude the allegations in the Complaint do establish a violation of their Fourth Amendment rights, and we consider in section II.B.2.a. whether the rights of these AR Group Plaintiffs were clearly established.

b. Strip searches of AL and CR Group Plaintiffs

We turn next to the constitutionality of blanket strip searches conducted on the AL and CR Group

Plaintiffs after becoming entitled to release. Plaintiffs allege, with respect to the AL Group, the Jail has a practice of conducting blanket strip searches on detainees who have posted bond or who have been ordered released at a First Appearance hearing at the Jail. The AL Group Plaintiffs were subjected to the booking process, including the booking strip searches, after becoming entitled to release because their point-of-entry booking into the Jail was not started or completed upon their arrival at the Jail. We assume the AL Group Plaintiffs were subjected to strip searches as part of this late booking process because they were placed in the general jail population while the staff in the Records Room, as part of the release process, searched for other detention orders, warrants, and holds.[34]

Plaintiffs also allege, with respect to the CR Group, the Jail has a policy of conducting blanket strip searches on persons who are returned to Jail following a court appearance at which they were ordered released, despite the fact that these "in-custody defendants" were under the constant supervision of the Sheriff's deputies, were not permitted to have contact with anyone while in transit or at the courthouse, and were already strip

[34] Plaintiffs do not challenge the late booking process as a whole. For example, Plaintiffs do not challenge the process during which a person committed to the Jail is fingerprinted, identified, and entered into the Jail's computerized inmate management system. Rather, Plaintiffs challenge the policy of conducting booking strip searches, as part of the late booking process, after they have posted bond or have been ordered released by a judicial officer at the Jail.

searched upon entering the Jail. The CR Group Plaintiffs were strip searched upon their return from the courthouse before being booked back into the general jail population, where they were held while the Records Room searched for outstanding detention orders, warrants, and other holds before releasing them. The CR Group Plaintiffs had already been strip searched once as part of their point-of-entry booking into the Jail and thus were subjected to blanket strip searches twice.

As with arrestee strip searches, the Supreme Court's reasonableness test articulated in *Bell* is the applicable standard to evaluate the strip searches of the AL and CR Group Plaintiffs. In each case, the test requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it was conducted." *Bell*, 441 U.S. at 559, 99 S. Ct. at 1884.[35] This Court conducted such a balancing in *Wilson* and *Skurstenis,* explaining the "justification" prong of the *Bell* test and finding that strip searches of arrestees as they enter the Jail cannot be justified on the single ground that the arrestees will be placed in the Jail's general population. *Wilson*, 251 F.3d at 1342-43; *Skurstenis*, 236 F.3d at 682. Rather, under the law of this Circuit, an arrestee to be detained in the general jail

[35] Because the AL and CR Group Plaintiffs do not challenge the scope, place, or manner of their strip searches, we address only the "justification" prong.

population has a constitutional right under the Fourth Amendment to be free from strip searches conducted without reasonable suspicion that the detainee is concealing weapons, drugs, or other contraband. *Wilson*, 251 F.3d at 1341-43; *Skurstenis*, 236 F.3d at 678, 680, 682. Here, the justification is the same as in *Wilson* and *Skurstenis*, that is, continued detention in the general jail population. Additionally, the privacy interests of the AL and CR Group Plaintiffs are the same, or arguably greater than, those of arrestees because they are entitled to release and the basis for their detention at the Jail no longer exists.[36] Accordingly, if our precedent requires reasonable suspicion to justify point-of-entry strip searches of arrestees bound for the general jail population, then at a minimum, reasonable suspicion must exist to justify strip searches of persons entitled to release from the Jail who are to be placed in the general jail population while their records are checked for other detention orders, warrants, or holds. Therefore, we must deem unconstitutional the Jail's policies of conducting blanket strip searches on detainees who are entitled to release from the Jail under the factual circumstances presented here.

Although we conclude the Jail's policy is unconstitutional, we must determine whether reasonable suspicion existed to justify the particular strip searches of the AL and CR Group Plaintiffs. We first discuss the two Plaintiffs in the AL Group, Powell and Matkin. Because Powell posted bond,

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[36] We recognize that the AL Group Plaintiffs who posted bond still have charges pending against them.

rather than having been ordered released, his arrest charge remained pending against him at the time he was strip searched. Therefore, the nature of the offense for which he was arrested may give rise to reasonable suspicion to justify his strip search. Powell was arrested on charges of "disorderly conduct" and failure to pay a "bar tab," neither of which are crimes of violence or involve weapons or drugs. Thus, we conclude that Powell's strip search after having posted bond was not supported by reasonable suspicion based on the nature of the arrest charge alone. Matkin, however, was ordered released by a judicial officer at the Jail. According to the Complaint, Matkin was arrested on March 18, 2004 on a charge of "aggravated assault"; on March 19, 2004, a judicial officer *at the Jail* dismissed the aggravated assault charge and ordered Matkin released; instead of being released, Matkin was booked into the Jail, strip searched, and held for four days; Matkin was permitted to leave the Jail only on March 23, 2004. Based on the allegations, we cannot say at this 12(b)(6) stage that Matkin's strip search was supported by reasonable suspicion.[37]

The two Plaintiffs in the CR Group, Evans and Wolf, had already been strip searched upon entering the Jail and were ordered released in state court. Thus, there were no pending charges against them at the time they were strip searched again, and we cannot look to the nature of their arrest charges to find reasonable suspicion. Further, according to the

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[37] *See supra* note 33.

Complaint, the CR Group Plaintiffs were under constant supervision while in transit to and from the Jail and while at the courthouse, and they were not permitted to have contact with anyone other than the Sheriff's deputies and their attorneys. Plaintiffs make no allegations indicating they had an opportunity to acquire contraband during their transfers within the Jail or between the Jail and the courthouse.[38]

We therefore conclude that all Plaintiffs of the AL Group-Powell[39] and Matkin—and all Plaintiffs of the CR Group-Evans[40] and Wolf—have sufficiently alleged violations of their Fourth Amendment rights. We proceed to determine whether their rights were clearly established in section II.B.2.b. below.

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[38] Because the allegations do not give rise to reasonable suspicion as required under our precedent, we need not determine what particular level of cause is necessary to justify the strip searches of the AL and CR Group Plaintiffs. Further, at this 12(b)(6) stage, Defendants have had no opportunity to present evidence on, or respond about, whether there was constant supervision and no contact or, even so, whether there were opportunities to obtain weapons, other contraband, or items from which weapons could be made.

[39] As we concluded above, Powell's strip search upon being booked into the Jail, which was based on his second commitment to the Jail after his bond was revoked, also violated his Fourth Amendment rights.

[40] Although the strip search conducted on Evans upon being booked into the Jail did not violate his Fourth Amendment rights, *see supra*, his strip search after returning from a court appearance at which he was ordered released lacked reasonable suspicion and, under our precedent, violated his Fourth Amendment rights.

2. Clearly Established Law

In determining whether a constitutional right is clearly established, "[t]he relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201, 121 S. Ct. at 2156. The contours of the right must be sufficiently clear such that a reasonable official would understand that his conduct violates that right. *Hope*, 536 U.S. at 739, 122 S. Ct. at 2515. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987) (citation omitted)). The salient question, therefore, is whether the state of the law gave the government official "fair warning" that his treatment of the plaintiff was unconstitutional. *Id.* at 741, 122 S. Ct. at 2516; *see also Marsh v. Butler County*, 268 F.3d 1014, 1031 (11th Cir. 2001) (en banc) (stating "fair and clear notice to government officials is the cornerstone of qualified immunity").

In most instances, "fair warning" will be given by case law existing at the time of the alleged violation. *See Vinyard*, 311 F.3d at 1351. In finding applicable case law, we look to decisions of the United States Supreme Court, decisions of this Court, and decisions

of the highest court of the pertinent state. *Marsh*, 268 F.3d at 1032-33 n.10; *Hamilton v. Cannon*, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996). In many instances, case law will announce a holding that is tied to a particular set of facts. *Vinyard*, 311 F.3d at 1351-52. When such fact-specific precedents are said to clearly establish the law, the circumstances in the instant case facing the government official must be "materially similar" to those in the preexisting case law for us to conclude the government official had fair warning of the unconstitutionality of his conduct. *See id.* at 1352. However, although cases with materially similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not always necessary. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516. A governmental official can be on notice that his conduct violates the law even in novel factual circumstances. *Id.*; *see Vinyard*, 311 F.3d at 1351-52. Where case law announces broad principles of law that are not tied to particularized facts, such case law can clearly establish the law applicable in a variety of different factual circumstances. *Vinyard*, 311 F.3d at 1351. We have cautioned, however, that if a broad principle is to clearly establish the law applicable to a specific set of facts, "it must do so 'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's *conduct* did violate federal law when the official acted." *Id.* (emphasis added).

a. Strip Searches of AR Group Plaintiffs

We first consider whether the Fourth Amendment rights of Plaintiffs Powell, Clemons, Middleton, Witherspoon, and Wolf of the AR Group were clearly established. This Court's panel decisions in both *Skurstenis* and *Wilson,* issued before the strip searches in the instant case occurred, make clear that jailers are required to have reasonable suspicion of weapons, drugs, or other contraband before strip-searching arrestees bound for the general jail population. *Wilson*, 251 F.3d at 1343 (holding the strip search of the plaintiff absent reasonable suspicion, as well as Shelby County Jail's policy authorizing the strip search, were unconstitutional); *Skurstenis*, 236 F.3d at 682 (holding Shelby County Jail's policy of strip-searching inmates without reasonable suspicion was unconstitutional); *see also Cuesta v. School Bd. of Miami-Dade County*, 285 F.3d 962, 969 (11th Cir. 2002) ("This Court has explained the 'justification' prong of the *Bell* decision in two recent cases: *Skurstenis v. Jones* and *Wilson v. Jones*. Both cases make clear that the Fourth Amendment requires jail officials to have 'reasonable suspicion' that an arrestee is concealing weapons or contraband before they can perform a strip search." (citations omitted)).

Further, on at least two occasions, this Court has emphasized the holding of *Wilson*. In *Hicks*, for example, a panel of this Court addressed the constitutionality of a county jail's practice of strip searching every arrestee to be placed in the general

jail population. Citing *Wilson*, we stated: "[G]iven the Circuit's precedent, we must conclude the search of Plaintiff cannot be justified under the Constitution on the single ground that Plaintiff was about to be placed in the Jail's general population," and "we accept that reasonable suspicion is required by the law of this Circuit." *Hicks*, 422 F.3d at 1251. In *Evans I*, we again recited the holding of *Wilson*: "Arrestees who are to be detained in the general jail population can constitutionally be subjected to a strip search only if the search is supported by reasonable suspicion that such a search will reveal weapons or contraband." *Evans I*, 351 F.3d at 490. Accordingly, we conclude Sheriff Barrett had fair warning that the blanket strip searches conducted on the AR Group Plaintiffs were unconstitutional.

It is true, as the district court pointed out, that we have questioned our requirement of reasonable suspicion. *See Evans II*, 407 F.3d at 1278 ("Most of us are uncertain that jailers are required to have a reasonable suspicion of weapons or contraband before strip searching–for security and safety purposes–arrestees bound for the general jail population); *Hicks*, 422 F.3d at 1251 n.5 ("We personally question that such a practice violates the Fourth Amendment."). However, our questioning has been merely dicta, and we have previously recognized that dicta plays no role in the clearly established analysis: "The law cannot be established by dicta. Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law." *Hamilton*, 80 F.3d at 1530. However, even if our dicta

in *Evans II* and *Hicks* could be said to "muddle" the law of this Circuit, the opinions in both cases were issued *after* the alleged strip searches in the instant case occurred and thus could not have affected Sheriff Barrett.

We also disagree with the district court's conclusion that there is a "pronounced dissimilarity" between the strip searches in *Wilson* and those in the instant case such that *Wilson* could not have given Sheriff Barrett fair warning of our requirement of reasonable suspicion. Specifically, the district court found the strip searches alleged in the instant case were "markedly less invasive" than those in *Wilson*. This ignores the allegations in the instant case that Plaintiffs were required not only to remove their clothing but also to shower together with a group of thirty or forty other persons. Each arrestee then either singly or standing in line with others was visually inspected front and back. In *Wilson*, the plaintiff was required to remove her clothing, "squat, spread her buttocks, and cough three times." *Wilson*, 251 F.3d at 1341. The female officer in *Wilson* checked the plaintiff's ears, mouth, nose, and breasts during the search. *Id.* at 1341-42. While the strip search in *Wilson* and those in the instant case were conducted in different manners, each was invasive and we cannot conclude that any difference in the degree of invasiveness is material. Like the instant case, *Wilson* addressed strip searches of arrestees to be placed in the general jail population without an individualized finding of reasonable suspicion. *See id.* at 1341. Thus, while *Wilson*'s holding is to a certain

extent tied to the particular facts at issue, the pertinent facts of both cases are materially similar.[41] Accordingly, we conclude Sheriff Barrett had fair warning that strip-searching the AR Group Plaintiffs absent reasonable suspicion violated their Fourth Amendment rights.

Because Plaintiffs Powell, Clemons, Middleton, Witherspoon, and Wolf sufficiently alleged violations of their Fourth Amendment rights, and because such rights were clearly established, we reverse the district court's dismissal of the strip search claims for monetary damages against Sheriff Barrett in her individual capacity.

b. Strip Searches of AL and CR Group Plaintiffs

We next consider whether the Fourth Amendment rights of Plaintiffs Powell and Matkin, of the AL Group, and Plaintiffs Evans and Wolf, of the CR Group, were clearly established. The *conduct* challenged in the instant case—routine, indiscriminate strip searches—is the same as the conduct we addressed in *Wilson*. Further, in both *Wilson* and the instant case, the purported justification for the routine, indiscriminate strip

[41] We note that *Wilson's* holding imposing a requirement of reasonable suspicion was in no way qualified by the manner in which the strip search was conducted. However, because judicial opinions "cannot make law beyond the facts of the cases in which those decision are announced," we recognize that the holding is limited to a certain extent by the material facts presented to the Court. *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003).

searches was that the arrestees would be placed in the general jail population. *Wilson,* 251 F.3d at 1341; *see also Hicks*, 422 F.3d at 1251. We concluded in *Wilson* that such a justification, alone, was not sufficient to justify the challenged conduct. *See Wilson*, 251 F.3d at 1341, 1343. To the extent the rule announced in *Wilson* was tied to particularized facts, we determine the facts of the instant case with respect to the AL and CR Groups are materially similar to the pertinent facts in *Wilson*.

The fact that the AL and CR Group Plaintiffs were not newly-admitted arrestees makes it even more obvious under *Wilson* that their strip searches were unconstitutional. They, unlike newly-admitted arrestees, were entitled to release from the Jail and, in case of those Plaintiffs ordered released either at the Jail or in state court, no longer had pending charges against them. Accordingly, we conclude Sheriff Barrett had fair warning, under this Circuit's precedent, that strip-searching the AL and CR Group Plaintiffs absent reasonable suspicion violated their Fourth Amendment rights.

Because the AL and CR Group Plaintiffs sufficiently alleged violations of their Fourth Amendment rights, and because such rights were clearly established, we reverse the district court's dismissal of their strip search claims against Sheriff Barrett in her individual capacity.

C. Municipal Liability of the County and the City under § 1983

The question of municipal liability under § 1983 is relevant only when a constitutional violation has occurred. *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996). Thus, we address the County's and City's liability under § 1983 only with respect to those Plaintiffs who have sufficiently alleged violations of their Fourth Amendment rights, namely Plaintiffs Powell, Middleton, Witherspoon, Matkin, Wolf, and Evans.

"The Supreme Court has placed strict limitations on municipal liability under § 1983." *Grech*, 335 F.3d at 1329. A municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue. *City of Canton v. Harris*, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203 (1989). Thus, a plaintiff seeking to impose liability on a municipality under § 1983 must identify a municipal policy or custom that caused the plaintiff's injury. *Grech*, 335 F.3d at 1329. Because a municipality will rarely have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs must show the local government has a custom or practice that evidences a "deliberate indifference" to the plaintiff's right. *See id.*; *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). Only where the municipality's custom or practice reflects a "deliberate" or "conscious" choice from among various alternatives can the municipality be liable for its conduct. *Harris,* 489 U.S. at 388, 109 S. Ct. at 1205. However, it is not

enough to identify conduct properly attributable to the municipality. *Id.* A plaintiff must also demonstrate that the municipality's custom is the "direct causal link" between the municipality and the constitutional injury such that the municipality's action was the "moving force" behind the violation. *Id.* at 385, 389.

Our decision today that Sheriff Freeman acts as an arm of the State forecloses Plaintiffs' argument that the County can be held liable under § 1983 based on its control of the strip search policies at the Jail. As we previously explained, the Sheriffs do not act as policymakers for the County when performing their function of maintaining security at the Jail. *See Manders*, 338 F.3d at 1328; *Grech*, 335 F.3d at 1332.

However, plaintiffs identify another set of "policies" which they claim the City and County do control, namely the County's and the City's policies of committing arrestees to the Jail through their respective police departments. We agree with the district court that, when read in the light most favorable to Plaintiffs, the Complaint can be read to allege these other "policies." Nonetheless, as we explain below, we conclude that Plaintiffs' claims of municipal liability against the County and City for the violation of Plaintiffs' Fourth Amendment rights, even when based on these other "policies," fail.

1. Liability of the City

With respect to the City, not one of the Plaintiffs who sufficiently alleged a violation of their Fourth Amendment rights was arrested by the City of

Atlanta Police Department. There are no constitutional injuries attributable the City, therefore, because the City did not place at the Jail any of the Plaintiffs who sufficiently alleged constitutional injuries. Because the City did not violate the constitutional rights of these Plaintiffs, Plaintiffs' strip search claims against the City under § 1983 must be dismissed. *See Rooney*, 101 F.3d at 1381 (explaining that inquiry into a governmental entity's custom or policy is relevant only when a constitutional deprivation has occurred).

2. Liability of the County

With respect to the County, Plaintiffs claim the County "knew or should have known" of the unconstitutional strip searches and were "deliberately indifferent" to Plaintiffs' rights "to be free from illegal strip searches." Plaintiffs allege the County's deliberate indifference was the "moving force" or "motivating factor" behind Plaintiffs' constitutional injuries. Although Plaintiffs allege that the County was "deliberately indifferent," we question whether the County's commitment of arrestees at the Jail was in fact a "deliberate choice from among various alternatives." In fact, unlike their allegations about the City, Plaintiffs do not specifically allege that the County has a choice over where to commit its arrestees.

Even assuming, however, the County's placement of arrestees at the Jail constitutes a policy that reflects a deliberate indifference to Plaintiffs' Fourth Amendment rights, this case presents additional problems of causation. The link between

the County's policy of placing arrestees at the Jail and the strip searches conducted at the Jail by the Sheriff and his deputies–over which the County has no control–is too attenuated to impose liability on the County. *See Turquitt v. Jefferson County*, 137 F.3d 1285, 1292 (11th Cir. 1998) ("[L]ocal governments can never be liable under § 1983 for the acts of those whom the local government has no authority to control."). We recognize that had the County not placed its arrestees at the Jail, those persons would not be subjected to the strip searches at the Jail; but we cannot say, based on Plaintiffs' allegations, that the County's placement of arrestees at the Jail was the direct causal link or the moving force that animated the behavior of the Sheriffs and their deputies that resulted in the constitutional violations alleged. "Obviously if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any . . . harm inflicted by a municipal official." *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S. Ct. 2427, 2436 (1985) (plurality opinion). For example, Plaintiffs would never have been committed to the Jail if the County did not have a "policy" of arresting state offenders, and Plaintiffs would never have been arrested, if the County did not have "policy" of establishing a police force. *See id.* But the Supreme Court's rigorous standards of culpability and causation that apply where a municipality's actions are facially valid require more, which Plaintiffs have failed to show. *See Harris*, 489 U.S. at 388, 109 S. Ct. at 1205. Plaintiffs' conclusory statement that the County was the "moving force" behind Plaintiffs' injuries does not cure this defect.

See Twombly, 127 S. Ct. at 1964-65 (requiring more than a formulaic recitation of the elements of a cause of action to survive a motion to dismiss). We therefore reverse the district court's denial of the County's and City's motions to dismiss.[42]

III. CONCLUSION

Based on the foregoing, we affirm the district court's dismissal of the strip search claims for monetary damages against Sheriff Freeman in his official capacity; we affirm in part and reverse in part the district court's dismissal of the strip search claims for monetary damages against Sheriff Barrett in her individual capacity; we reverse the district court's denial of the County's and the City's motions to dismiss Plaintiffs' strip search claims; and we remand for the district court to dismiss Plaintiffs' strip search claims for monetary damages against Sheriff Freeman in his individual capacity and Plaintiffs' strip search claims for injunctive relief against Sheriff Freeman in his official capacity.

After remand consistent with our instructions, only the strip search claims for monetary damages asserted by Plaintiffs Powell (both his AR and AL Group claims), Clemons, Middleton, Witherspoon, Wolf, Matkin, and Evans (only his CR Group claim) against Sheriff Barrett in her individual capacity will remain.

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[42] We note that Plaintiffs do not argue on appeal the County was deliberately indifferent based on its failure to train the Sheriffs and their staff.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED IN PART

Appendix:

AR GROUP *Blanket strip searches as part of point-of entry booking into the Jail*	
Name	**Charge**
C. Alan Powell	Bond revocation on charges of disorderly conduct and failure to pay a bar tab
David Evans	Disorderly conduct, weapons warrant
Stanley Clemons	Burglary
Alan Middleton	Traffic ticket warrant
Anthony Westbrook	Simple battery, child abandonment (nonsupport), forgery probation warrant
Benjamin Blake	Battery, trespass, obstruction
Harry Witherspoon	DUI
Antionne Wolf	Contempt/non-payment of child support

AL GROUP *Blanket strip searches of detainees who posted bond or were ordered released at the Jail before their point-of-entry booking into the Jail was started or completed*		
Name	**Charge**	**Reason for Release**
C. Alan Powell	Disorderly conduct, failure to pay a bar tab	Posted bond at the Jail
Kristopher Alan Matkin	Aggravated assault	Charges dismissed by judicial officer at the Jail

CR GROUP *Blanket strip searches of detainees upon returning from a court appearance after having been ordered released in state court*	
Name	**Charge**
David Evans	Disorderly conduct, weapons warrant
Antionne Wolf	Contempt/non-payment of child support

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16734

C. ALAN POWELL, individually, and on behalf of all others similarly situated; TORY DUNLAP, individually, and on behalf of all others similarly situated; LEE ANTONIO SMITH, individually, and on behalf of all others similarly situated; DAVID EVANS, individually, and on behalf of all others similarly situated,

Plaintiffs-Appellees
Cross-Appellants,

v.

SHERIFF JACQUELINE BARRETT, Fulton County, State of Georgia; SHERIFF MYRON FREEMAN, Fulton County, State of Georgia; CHAIRPERSON KAREN HANDEL, Fulton County Board of Commissioners; MEMBER ROBB PITTS, Fulton County Board of Commissioners; MEMBER TOM LOWE, Fulton County Board of Commissioners; MEMBER EMMA I. DARNELL, Fulton County Board of Commissioners; MEMBER NANCY A. BOXILL, Fulton County Board of Commissioners; MEMBER WILLIAM EDWARDS, a.k.a. BILL EDWARDS, Fulton County Board of Commissioners; CITY OF ATLANTA, State of Georgia,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States
District Court for the Northern District of Georgia
D.C. Docket No. 04-01100-CV-RWS-1

September 4, 2008

OPINION

Before EDMONDSON, Chief Judge, and TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON and PRYOR, Circuit Judges.

CARNES, Circuit Judge:

We granted rehearing en banc to decide whether a policy or practice of strip searching all arrestees as part of the process of booking them into the general population of a detention facility, even without reasonable suspicion to believe that they may be concealing contraband, is constitutionally permissible. We answer that question in the affirmative, at least where the strip search is no more intrusive than the one the Supreme Court upheld in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979).

I.

The facts and procedural history of this entire case are set out in accurate detail in the panel opinion. *Powell v. Barrett*, 496 F.3d 1288 (11th Cir. 2007), *vacated*, No. 05-16734 (11th Cir. Feb. 1, 2008). As it explains, the named plaintiffs in this class

action lawsuit are eleven former detainees at the Fulton County Jail in Georgia, all of whom were strip searched upon entering or re-entering the general population at that detention facility. *Id.* at 1296, 1298. The eleven named plaintiffs can be divided into three groups, which overlap to some extent. *Id.* at 1297. One of those three groups is "the Arrestee Strip Search Class (AR Group)," which consists of the eight plaintiffs who were strip searched as part of the point-of-entry booking process before they were placed into the general jail population for the first time. *Id.* at 1297–98. Three of the eight members of that group were arrested on charges that supplied reasonable suspicion to believe that they might be concealing contraband at the time they were booked into the jail. *Id.* at 1312.

Our en banc interest, as reflected in our briefing instructions, is in the strip searches conducted on the other five members of the arrestee group (plaintiffs Powell, Clemons, Middleton, Witherspoon and Wolf). *Id.* As to each of those five, neither the charge itself nor any other circumstance supplied reasonable suspicion to believe that the arrestee might be concealing contraband. *See id.* at 1312–13. The five were strip searched solely because they were entering the general population of inmates at the detention facility.

Because this is an appeal from the denial of a motion to dismiss, we take the facts from the allegations of the complaint. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008); *Locke v. SunTrust Bank*, 484 F.3d 1343, 1345 n.1 (11th Cir.

2007); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1186 (11th Cir. 2004). The allegations are that four of these five plaintiffs were taken to the Fulton County Jail for detention after being arrested on relatively minor charges: a bail revocation on a disorderly conduct charge, a traffic ticket warrant, a DUI charge, and a contempt charge for failure to pay child support. *Powell*, 496 F.3d at 1312; (R6:78:¶ 89.) The fifth plaintiff in this group was arrested on a burglary charge, which we (like the panel) assume did not involve an element of violence. *Powell*, 496 F.3d at 1312 & n.32.

"Every person booked into the Fulton County Jail general population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search, and regardless of the crime with which the person is charged." (R6:78:¶ 180.) The booking process includes "having the arrested person go into a large room with a group of up to thirty to forty other inmates, remove all of his clothing, and place the clothing in boxes." (*Id.* ¶ 181.) The entire group of arrestees then takes a shower in a single large room. (*Id.* ¶¶ 182, 238.) After the group shower each arrestee "either singly, or standing in a line with others, is visually inspected front and back by deputies." (*Id.* ¶ 183.) "Then each man [takes] his clothes to a counter and exchange[s] his own clothes for a jail jumpsuit." (*Id.* ¶ 239.) Identifying an illustrative case, the complaint alleges that one of these five plaintiffs "along with every other inmate in the process, had to stand before a guard front and center, and show his front and back

sides while naked." (*Id.* ¶ 240.) There is no allegation that any members of the opposite sex either conducted the visual searches or were present while they were being conducted. Nor is there any allegation that the searches were conducted in an abusive manner. *See Powell*, 496 F.3d at 1310 n.28 ("We note that, in the instant case, Plaintiffs do not challenge the *manner* of the strip searches.").

The five plaintiffs contend that the strip searches violated the Fourth Amendment because there was no reasonable suspicion to believe that any of them had hidden contraband. The panel felt forced to agree, citing our prior decision in *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), as well as an earlier opinion that had reached the same conclusion, albeit in dicta, *Skurstenis v. Jones*, 236 F.3d 678, 682 (11th Cir. 2000) (stating that a strip search without reasonable suspicion does not comport with the Fourth Amendment but that reasonable suspicion existed in that case). *Powell*, 496 F.3d at 1310, 1312; *see also Cuesta v. Sch. Bd.*, 285 F.3d 962, 969 (11th Cir. 2002) (noting that "[i]n *Wilson*, we made the dicta of Skurstenis binding law" but concluding that reasonable suspicion existed in that case). The panel did point out that our decisions imposing a reasonable suspicion requirement for point-of-entry strip searches at detention facilities had "relied on, but misconstrued, the Supreme Court's decision in *Bell*," and that "[w]e have since recognized our misinterpretation" of that decision. *Powell*, 496 F.3d at 1312 (citing *Evans v. Stephens*, 407 F.3d 1272, 1279 (11th Cir. 2005) (en banc) (dicta)).

Despite its misgivings, the panel acted properly in following *Wilson* because it was bound by the prior panel precedent rule to do so. *Smith v. GTE Corp.*, 236 F.3d 1292, 1301–02 (11th Cir. 2001); *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000); *United States v. Steele*, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (en banc); *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997); *Gwin v. Snow*, 870 F.2d 616, 623–24 (11th Cir. 1989). We are not. Sitting en banc, we are free to revisit the *Wilson* decision and its interpretation of *Bell* and to decide for ourselves what *Bell* means.

II.

The reasoning that leads us to uphold the searches of these five plaintiffs is simple. After balancing the privacy interests of detention facility inmates against the important security interests involved, the Supreme Court upheld the visual body cavity strip searches at issue in the *Bell* case against a Fourth Amendment attack. The security needs that the Court in *Bell* found to justify strip searching an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time. And the searches conducted in the *Bell* case were more intrusive, and thereby impinged more on privacy interests, than those conducted in this case. It follows from the *Bell* decision that the less intrusive searches in this case do not violate the Fourth Amendment. That is the gist of our reasoning, the details of which follow.

A.

Before getting into those details, we pause briefly to address the defendants' contention that the test we should apply is the one for prison regulations in general that was announced in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), instead of the more strip search-specific Fourth Amendment analysis that the Supreme Court used in *Bell*. In their brief, the plaintiffs oppose the defendants' position, arguing instead that we should apply the specific Fourth Amendment approach.

The plaintiffs' position is consistent with the Supreme Court's repeated admonitions that we should not assume that it has, by implication, overruled a prior decision specifically on point with later, more general language in a different decision. *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S. Ct. 1969, 1978 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the

prerogative of overruling its own decisions."). We take those admonitions seriously. *See United States v. Greer*, 440 F.3d 1267, 1275–76 (11th Cir. 2006); *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895, 908 (11th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 525–26 (11th Cir. 1997); *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 n.2 (11th Cir. 1997). Until the Supreme Court tells us that the *Bell* approach no longer applies where that Court applied it, we are inclined to continue using it.

We also concur in the agreement that is implicit in the parties' opposing positions—that to the extent of any difference, the *Bell* Fourth Amendment test is more detainee friendly in this context than the test in *Turner*. Because we conclude that the plaintiffs lose even under the straight Fourth Amendment approach of *Bell*, we need not decide if that approach has been superseded by the more deferential *Turner* one.

B.

The *Bell* case involved a class action lawsuit brought by pretrial detainees being held at the federal Metropolitan Correctional Center in New York City. *Bell*, 441 U.S. at 523, 99 S. Ct. at 1866. The MCC had a general strip search policy that applied to all inmates, *id.* at 530, 99 S. Ct. at 1869, including pretrial detainees, "convicted inmates who [were] awaiting sentencing or transportation to federal prison," "convicted prisoners who [had] been lodged at the facility under writs of habeas corpus . . . issued to ensure their presence at upcoming trials,

witnesses in protective custody, and persons incarcerated for contempt," *id.* at 524, 99 S. Ct. at 1866.

Under the MCC's policy all inmates, regardless of the reason for their detention, were required "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Id.* at 558, 99 S. Ct. at 1884. More specifically: "If the inmate is a male, he must lift his genitals and bend over to spread his buttocks for visual inspection. The vaginal and anal cavities of female inmates also are visually inspected." *Id.* at 558 n.39, 99 S. Ct. at 1884 n.39.

The pretrial detainees alleged in their complaint in *Bell* that the MCC's strip search policy violated their Fourth Amendment right to be free from unreasonable searches. *Id.* at 526–27 & n.7, 99 S. Ct. at 1868 & n.7. The district court emphatically agreed. *United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 146–48 (S.D.N.Y. 1977). In an overwrought passage crackling with indignation, the court described the postures that the inmates were forced to assume during the visual body cavity searches as "calculated to trigger, in the officer and inmate respectively, feelings of sadism, terror, and incipient masochism that no one alive could have failed to predict." *Id.* at 147. The court found that on some occasions "male correction officers have been incited by the temptation to indulge the sense of a cheap machismo" and had made "insultingly suggestive remarks and banal but terrifying expressions of

aggression" to those being searched. *Id.* It was, the court insisted, a "grisly procedure" and a "loathesome practice." *Id.* The court credited the testimony of some inmates who said that they had found the visual body cavity searches "so high a price as to forego [contact] visits or to feel after a visit that it was not worthwhile." *Id.*

Not only that, but the district court in *Bell* also found that visually inspecting the body cavities of inmates after each contact visit had turned up barely any contraband. *Id.* That was not surprising, the court reasoned, given that "inmates and their visitors are in full view during the visits and fully clad," so that "[t]he secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility." *Id.* In all of the time that the searches had been conducted there had been only one occasion when any object—it was a red balloon containing heroin—had been spotted in an inmate's vagina. *Wolfish v. Levi*, 573 F.2d 118, 131 (2d Cir. 1978) ("[I]n this case appellants proved only one instance in the MCC's several years of existence when contraband was found during a body cavity inspection."); *Wolfish*, 439 F. Supp. at 147. The visual inspections of anuses had never turned up any contraband, a fact that did not surprise the court for physiological reasons it felt compelled to explain. *Wolfish*, 439 F. Supp. at 147.

Even though it recognized that "the prospect of the strip search may serve as a deterrent to people planning to secrete and import forbidden things," the district court believed that deterrence "cannot justify

the more extreme and offensive aspects of the strip search." *Id.* It advised the warden of MCC and the Director of the Bureau of Prisons that they should be most concerned about weapons, which "are discoverable by metal detecting devices and, if necessary, other equipment employed for airline security and other purposes." *Id.* As for "other things, mainly narcotics, that might still be secreted and evade detection," the court could not say "with confidence" how serious that problem may be. *Id.* It could say with confidence, though, that "the goal of absolute security is unattainable, and we must assume that some contraband will continue to make its way into jails and prisons, as it always has—whether through visitors, guards, lawyers, clergymen, or otherwise." *Id.* at 148.

That said, the district court in *Bell* insisted that it was not treating the security needs of the detention facility lightly and would let the officials who ran it "go as far as may be permitted by the demands of reasonableness in the Fourth Amendment and the claims of decency in the Fifth." *Id.* The court ordered the detention officials to "cease the routine requirements of anal and genital inspections after visits." *Id.* They could perform those inspections only "upon a specific and particular demonstration of probable cause for doing so." *Id.*

However, the district court in *Bell* did not curtail all routine strip searches. To the contrary, the court justified its restriction on anal and genital inspections by stating that: "[T]he demands of security are amply satisfied if inmates are required

to disrobe, to have their clothing subjected to inspection, and to present open hands and arms to demonstrate the absence of concealed objects." *Id.* The court allowed those full body visual strip searches, which did not require the inmates to take any action to more fully expose their anal or genital areas to inspection, to continue without any showing of cause. *Id.*; *see also Bell*, 441 U.S. at 558, 99 S. Ct. at 1884 ("The District Court upheld the strip-search procedure but prohibited the body-cavity searches, absent probable cause to believe that the inmate is concealing contraband."); *Wolfish*, 573 F.2d at 131 (stating that the district court judge "left the basic strip-search procedures undisturbed, but . . . [h]e prohibited inspection of the genitals and anus unless there is probable cause to believe that the inmate is concealing contraband"). The district court left the basic strip search procedure in place only "with grave reluctance, inviting reconsideration by wiser judges or [the detention officials] themselves in the more mature wisdom of future times." *Wolfish*, 439 F. Supp. at 148.

Three decades have passed but the Bureau of Prisons, which administers MCC, still has not reached the state of "more mature wisdom" that the district court in *Bell* hoped that it would. A materially identical strip search policy is still in effect at all federal detention facilities. *See infra* at 23–24. There was "reconsideration by wiser judges" of the district court's decision, but ultimately it did not come out the way that court had hoped.

On appeal, the Second Circuit agreed with the district court's conclusions about the strip searches. *Wolfish*, 573 F.2d at 131. Its reasoning about the body cavity inspection part of the strip searches is summed up in these two sentences from its opinion: "The gross violation of personal privacy inherent in such a search cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility. To speak plainly, in the circumstances presented by this record, the procedure shocks one's conscience." *Id.* The Second Circuit's decision nonetheless left the detention officials free to require, even without any individualized cause, full body visual strip searches. *Id.* What the decision prohibited, absent probable cause, was forcing inmates to assume postures or take other actions that would more fully expose their anal and genital areas to visual inspection. *Id.* In other words, the court of appeals affirmed the district court's order on strip searches. *Id.*

The Supreme Court did not. In facing the issue the high court did not attempt to airbrush the facts but instead described in unblinking terms how the visual body cavity searches were conducted. *Bell*, 441 U.S. at 558 & n.39, 99 S. Ct. at 1884 & n.39. Because the district court had upheld the strip search policy except for the body cavity inspections, it was that most intrusive part of the searches that defined the question before the Supreme Court. *See id.* at 558, 99 S. Ct. at 1884. The Court acknowledged that of the five MCC practices before it, the blanket policy of requiring body cavity inspections after each contact

visit with anyone from the outside "instinctively gives us the most pause." *Id.* But the Court did not pause long. It quickly demolished, in just three paragraphs and an equal number of footnotes, the arguments that the policy violated the Fourth Amendment. *Id.* at 558–60, 99 S. Ct. at 1884–85.

The Supreme Court did not hold that inmates at a detention facility had any Fourth Amendment rights to begin with. It only assumed that they did. *Id.* at 558, 99 S. Ct. at 1884 ("However, assuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility . . . ."). Even with that assumption, however, the Court concluded that the body cavity inspection searches after every contact visit were constitutionally permissible because the Fourth Amendment "prohibits only unreasonable searches, and under the circumstances, we do not believe that these searches are unreasonable." *Id.* (citation omitted).

The Court explained that the reasonableness of a search cannot be determined by "precise definition or mechanical application," but instead "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559, 99 S. Ct. at 1884. In balancing those interests there are four factors courts must consider: "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*

As for the first factor, the Supreme Court did not "underestimate the degree to which these searches may invade the personal privacy of inmates." *Id.* at 560, 99 S. Ct. at 1885. It described how intrusive the searches were when it described how they were performed. *Id.* at 558 n.39, 99 S. Ct. at 1884 n.39. And it quoted the Second Circuit's view that the searches were a "'gross violation of personal privacy.'" *Id.* at 558, 99 S. Ct. at 1884 (quoting *Wolfish*, 573 F.2d at 131). As for the second factor, the Court did not "doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion." *Id.* at 560, 99 S. Ct. at 1885. Such abuses are not to be condoned. *Id.* The searches must be conducted in a reasonable manner, but the Court recognized that "we deal here with the question whether visual body-cavity inspections . . . can *ever* be conducted on less than probable cause." *Id.* (The emphasized "ever" served to underscore the assumption that the searches will be conducted in a non-abusive, reasonable manner.)

The Supreme Court answered that question in the affirmative, and the reason it did so was the combined weight of the third and fourth factors—the justification for the searches and the place they were conducted. Those two factors merged into one heavy consideration because the searches took place in a detention facility, and the justification for them was the critically important security needs of the facility. As the Court explained: "A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other

contraband is all too common an occurrence." *Id.* at 559, 99 S. Ct. at 1884. The Court viewed that factor as a critical one even though the record indicated only one instance in three years "where an MCC inmate was discovered attempting to smuggle contraband into the institution on [her] person." *Id.* at 559, 99 S. Ct. at 1885; *see also Wolfish*, 439 F. Supp. at 147. That fact, the Court believed, "may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises." *Bell*, 441 U.S. at 559, 99 S. Ct. at 1885. The Court noted that officials had testified "that visual cavity searches were necessary not only to discover but also to deter the smuggling of weapons, drugs, and other contraband into the institution." *Id.* at 558, 99 S. Ct. at 1884.

The district court's position that less intrusive alternatives, such as metal detectors, should be used instead of the body cavity inspections was rejected. For one thing the Supreme Court was not ready to concede that lesser alternative analysis has any place in the Fourth Amendment area. *Id.* at 559 n.40, 99 S. Ct. at 1885 n.40 ("'[T]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'" (alteration in original) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–57 n.12, 96 S. Ct. 3074, 3082 n.12 (1976)). For another thing the Court decided that, even assuming lesser alternatives may be considered, the metal detectors suggested by the district court would

not be as effective as visual body cavity inspections because metal detectors cannot detect currency, drugs, and other nonmetallic contraband. *Id.*

The bottom line of the *Bell* decision is that, after "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates," the Supreme Court concluded that the visual body cavity inspections—the most intrusive part of the strip searches in that case—were reasonable under the Fourth Amendment. *Id.* at 559–60, 99 S. Ct. at 1884–85. The policy the Court upheld required that searches be conducted on every inmate after each contact visit, even without the slightest cause to suspect that the inmate was concealing contraband. *Id.* at 558, 99 S. Ct. at 1884.

C.

We are aware that some courts have interpreted the *Bell* decision as requiring, or at least permitting lower courts to require, reasonable suspicion as a condition for detention facility strip searches, especially those that involve visual body cavity inspections. *See, e.g., Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997) ("Balancing these interests, courts have concluded that, to be reasonable under *Wolfish*, strip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons. . . . Accordingly, it is clear that at least the reasonable suspicion standard governs strip and visual body cavity searches in the arrestee context as well." (citation omitted)); *Chapman v. Nichols*, 989 F.2d

393, 395 (10th Cir. 1993) ("In this case, it is undisputed that plaintiffs were arrested for minor traffic violations and were awaiting bail, that jail officials had no reasonable suspicion that these particular arrestees were likely to be carrying or concealing weapons or drugs, and that plaintiffs were searched solely because the blanket policy required all detainees to be subjected to a strip search. Every circuit court, including our own, which has considered the above circumstances under the *Wolfish* balancing test has concluded that a search under these circumstances is unconstitutional."). We ourselves have done that. *Wilson*, 251 F.3d at 1343 ("Because Wilson was strip searched absent reasonable suspicion, we hold that the search of Wilson, as well as the jail's policy authorizing her search, violated the Fourth Amendment prohibition against unreasonable searches and seizures."). Those decisions misread *Bell* as requiring reasonable suspicion.

The *Bell* decision, correctly read, is inconsistent with the conclusion that the Fourth Amendment requires reasonable suspicion before an inmate entering or reentering a detention facility may be subjected to a strip search that includes a body cavity inspection. And the decision certainly is inconsistent with the conclusion that reasonable suspicion is required for detention facility strip searches that do not involve body cavity inspections.

First, and most fundamentally, the Court in *Bell* addressed a strip search policy, not any individual searches conducted under it. The Court spoke

categorically about the policy, not specifically about a particular search or an individual inmate. *See Bell*, 441 U.S. at 560, 99 S. Ct. at 1885; *see also Hudson v. Palmer*, 468 U.S. 517, 538, 104 S. Ct. 3194, 3206 (1984) (O'Connor, J., concurring) (citing *Bell* for the proposition that "[i]n some contexts, . . . the Court has rejected the case-by-case approach to the 'reasonableness' inquiry in favor of an approach that determines the reasonableness of contested practices in a categorical fashion"). The policy that the Court categorically upheld in *Bell* applied to all inmates, including those charged with lesser offenses and even those charged with no wrongdoing at all who were being held as witnesses in protective custody. *See Bell*, 441 U.S. at 524, 99 S. Ct. at 1866. The policy did not require individualized suspicion. Just the opposite. It called for a search of every inmate returning from a contact visit regardless of whether there was any reasonable suspicion to believe that the inmate was concealing contraband. *See id.* at 558, 99 S. Ct. at 1884.

The Supreme Court said: "[A]ssuming for present purposes that inmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility, we nonetheless conclude that these searches do not violate that Amendment." *Id.* (citations omitted, emphasis added). When the Court stated that "these searches" do not violate the Fourth Amendment, it obviously meant the searches that were before it, and those searches were conducted

under a blanket policy without reasonable suspicion. It really is that simple.

If more is needed, it can be found in Justice Powell's dissenting opinion in *Bell*, the significance of which has been underappreciated.[1] Justice Powell dissented for one and only one reason, which was that the Court did not require reasonable suspicion for conducting the strip searches in that case. His opinion, a model of brevity, states in its entirety:

> I join the opinion of the Court except the discussion and holding with respect to body-cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

Bell, 441 U.S. at 563, 99 S. Ct. at 1886 (Powell, J., concurring in part and dissenting in part). Obviously, Justice Powell would not have dissented from a holding that the Court had not made.

Granted, it can be risky to place too much reliance on dissenting opinions because they sometimes take a Chicken Little or doomsday approach, exaggerating aspects of the majority opinion in order to have a bigger target to attack.

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[1] Some, but by no means most, of the discussion in this part of the opinion is borrowed, occasionally verbatim, from *Evans*, 407 F.3d at 1283–92 (Carnes, J., concurring specially), with the gracious consent of the author of that opinion.

Justice Powell's dissent in *Bell* is not of that type. It does not attack the majority opinion. Instead, it states in three sentences that it disagrees with only one aspect of the decision and that is the failure to require "some level of cause, such as a reasonable suspicion" before the "anal and genital searches described in this case" can be performed. *Id.* If the majority had required reasonable suspicion for body cavity inspection strip searches of pretrial detainees, Justice Powell would not have dissented at all. And Justice Marshall would have had one less thing to complain about in his separate dissenting opinion. *Id.* at 578, 99 S. Ct. at 1894 (Marshall, J., dissenting) ("Here, the searches are employed absent any suspicion of wrongdoing.").

From his perspective inside the Court, Justice Powell (like Justice Marshall) had a far better sense of the majority's decision in *Bell* than any of us lower court judges could, and he understood that the decision permitted the body cavity inspection strip searches without reasonable suspicion. Confronted with the dissenting statements, the majority, if it had not intended to permit those searches of pretrial detainees without reasonable suspicion, would have noted as much in its opinion. It would have been a simple matter to do that. The majority, however, did not change its opinion to state that reasonable suspicion was required because Justice Powell's (and Justice Marshall's) reading of its opinion was accurate. The *Bell* decision means that the Fourth Amendment does not require reasonable suspicion for this type of strip search in detention facilities.

The decisions that conclude to the contrary not only disregard the existence of the dissenting opinions, but they also ignore one momentous fact of Franciscan simplicity: The Bureau of Prisons' policy has not changed in any material respect. Under that policy body cavity strip searches without reasonable suspicion are conducted today just as they were when the *Bell* lawsuit was brought. Indeed, the year after the *Bell* decision the Bureau enshrined the policy in a regulation, where it remains to this day. The policy still subjects inmates to strip searches involving "a visual inspection of all body surfaces and body cavities" whenever there is *either* a "reasonable belief" *or* "a good opportunity for concealment has occurred." Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement No. 5521.05, Searches of Housing Units, Inmates, and Inmate Work Areas 6(b)(1) (1997) (quoting 28 C.F.R. § 552.11(c)(1)). And the policy specifies that "a good opportunity for concealment has occurred," and the searches are to be performed, when an inmate is processed into the facility for the first time, when an inmate returns from having any contact with the public, such as during a contact visit, and so on. *Id.* That policy applies to federal facilities nationwide. *See Bell*, 441 U.S. at 558, 99 S. Ct. at 1884. Yet, so far as we can tell, in the nearly thirty years since the *Bell* decision was issued no court has attempted to enjoin the Bureau of Prisons from performing body cavity inspection strip searches without reasonable suspicion. The reason should be obvious.

If the Supreme Court's decision in *Bell* had required, or permitted lower courts to require, reasonable suspicion before body cavity strip searches could be conducted at detention facilities, the district court in that case would have done so on remand. However, the court must have recognized that the Supreme Court's decision did not permit it to require reasonable suspicion before the searches could be performed. All other courts should recognize as much.

Some courts fail to recognize that because they misread one sentence from the *Bell* opinion. *See, e.g.*, *Swain*, 117 F.3d at 6; *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986). In that sentence the Supreme Court said: "But we deal here with the question whether visual body-cavity inspections as contemplated by the [facility's] rules can *ever* be conducted on less than probable cause." *Bell*, 441 U.S. at 560, 99 S. Ct. at 1885. The Court answered "yes," but neither the question nor the answer compels the conclusion that "less than probable cause" means "reasonable suspicion." The absence of reasonable suspicion is also "less than probable cause." The context of that sentence, which we have already discussed, *see supra* at 16, is also important. In the sentences that came before that one the Court had acknowledged that some guards may conduct the visual body cavity searches in an abusive fashion. *Bell*, 441 U.S. at 560, 99 S. Ct. at 1885; *see also Wolfish*, 439 F. Supp. at 147. The "ever" referred to searches that did not involve abuse. *Bell*, 441 U.S. at 560, 99 S. Ct. at 1885.

Interpreting the quoted sentence from *Bell* to require reasonable suspicion puts more weight on it than the words will bear. Doing so also ignores the rest of the majority opinion as well as the dissenters' interpretation of it, *see id.* at 563, 99 S. Ct. at 1886 (Powell, J., concurring in part and dissenting in part); *id.* at 578, 99 S. Ct. at 1894 (Marshall, J., dissenting), an interpretation that the majority implicitly accepted by not modifying its opinion to require reasonable suspicion. And it ignores the fact that the same searches that were being conducted without reasonable suspicion at MCC when *Bell* was decided are still being conducted without reasonable suspicion there and at every other federal detention facility in the country.[2]

One other point is worth discussing. In judging the constitutionality of strip searches for detainees, some other circuits draw a distinction between whether the person has been arrested on a felony charge or just for a misdemeanor or some other lesser violation. *See, e.g., Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Stewart v. Lubbock County, Tex.*, 767 F.2d 153, 156–57 (5th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999) (en banc); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

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[2] The parties have not cited and we have been unable to find any post-*Bell* decision enjoining any type of strip search at any federal detention facility.

While those decisions vary in detail around the edges, the picture they paint is essentially the same. The arrestee is charged with committing a misdemeanor or some other lesser violation and, while being booked into the detention facility, she is subjected to a strip search pursuant to the facility's policy. She later sues the officials asserting that the search was unconstitutional because the guards did not have any reasonable basis for believing that she was hiding contraband on her person. *See, e.g., Mary Beth G.*, 723 F.2d at 1266. In each cited case, the court of appeals concludes that because the plaintiffs were "minor offenders who were not inherently dangerous," *id.* at 1272, detention officials could conduct a strip search only where there was "a reasonable suspicion that the individual arrestee is carrying or concealing contraband," *Giles*, 746 F.2d at 617. In each of the cases where reasonable suspicion was lacking, the search is held to violate the Fourth Amendment.

Those decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance when it comes to detention facility strip searches. It finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities. The Supreme Court made no distinction in *Bell* between detainees based on whether they had been charged with misdemeanors or felonies or even with no crime at all. Instead, the policy that the Court treated categorically, and upheld categorically, was one under which all "[i]nmates at all Bureau of

Prison facilities, including the MCC, are required to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Bell*, 441 U.S. at 558, 99 S. Ct. at 1884. It was a blanket policy applicable to all.

Among the "[i]nmates at all Bureau of Prison facilities, including the MCC," were detainees facing only lesser charges, people incarcerated for contempt of court, and witnesses in protective custody who had not been accused of doing anything wrong. *See id.* at 524 & n.3, 558, 99 S. Ct. at 1866 & n. 3, 1884. The MCC was hardly a facility where all of the detainees were "awaiting trial on serious federal charges," as some of the opinions incorrectly state.[3] *See, e.g., Mary Beth G.*, 723 F.2d at 1272. It is on that basis that some of the decisions involving county jails erroneously distinguish what they describe as the exaggerated need for strip searches at that type of facility from the real need for them at federal facilities.[4] *Id.*

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[3] Nor was the MCC facility some special sort of seething cauldron of criminality. The Supreme Court described it this way: "The MCC differs markedly from the familiar image of a jail; there are no barred cells, dank, colorless corridors, or clanging steel gates. It was intended to include the most advanced and innovative features of modern design of detention facilities." *Bell*, 441 U.S. at 525, 99 S. Ct. at 1866. Yet, the Supreme Court found that "serious security dangers" warranted the strip search policy at MCC and all federal detention facilities. *Id.* at 559, 99 S. Ct. at 1884.

[4] Even if we were to buy into that distinction, which we do not, it would not make any difference in this case. The Fulton

The need for strip searches at all detention facilities, including county jails, is not exaggerated. Employees, visitors, and (not least of all) the detained inmates themselves face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband by inmates accused of misdemeanors as well as those accused of felonies. *See Clements v. Logan*, 454 U.S. 1304, 1305, 102 S. Ct. 284, 286 (Rehnquist, Circuit Justice) (noting that the jail's strip search policy had been "adopted after the shooting of a deputy by a misdemeanant who had not been strip-searched"), *vacated*, 454 U.S. 1117, 102 S. Ct. 961 (1981); *Johannes v. Alameda County Sheriff's Dep't*, No. C 04-458MHP, 2006 WL 2504400, at *4–6 (N.D. Cal. Aug. 29, 2006) (discussing in statistical detail as well as practical terms the contraband problem at a large county jail and the usefulness of strip searches in combating it); *Dodge v. County of Orange*, 282 F. Supp. 2d 41, 46–49 (S.D.N.Y. 2003) (discussing testimony that strip searches were essential to prevent gangs from smuggling in contraband to the county jail), *appeal dismissed*, 103 F. App'x 688 (2d Cir. 2004). Even some of the circuits that have required reasonable suspicion for searches of those arrested for misdemeanors concede that there have been instances where contraband was smuggled into

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County Jail is a large detention facility, housing about 2,900 inmates, some of whom are charged with or have been convicted of felonies. (*See* R6:78:¶ 102); *see also Foster v. Fulton County, Ga.*, 223 F. Supp. 2d 1292, 1294 (N.D. Ga. 2002); *Foster v. Fulton County, Ga.*, 223 F. Supp. 2d 1301, 1308 (N.D. Ga. 2002).

a jail by detainees facing only misdemeanor or other lesser charges. *See, e.g., Mary Beth G.*, 723 F.2d at 1272–73.

Then there is the fact that gang members commit misdemeanors as well as felonies. In one county jail, for example, fifty percent of those being held on "misdemeanor or lesser charges" were gang members. *Dodge*, 282 F. Supp. 2d at 48 & n.9 (citing figures from 2002). "Gang members are often more violent, dangerous, and manipulative than other inmates, regardless of the nature of the charges against them." *Id.* at 48. Moreover, some gang members "attempt to coerce family members or to coerce, cajole, or intimidate lesser violators into smuggling contraband into the facility." *Id.* To make matters worse, "officials at a county jail . . . usually know very little about the new inmates they receive or the security risks they present at the time of their arrival." *Id.* The officials usually have no way of knowing whether someone coming into the detention facility after an arrest on a misdemeanor or other minor offense is only a minor offender or is also a gang member who got himself arrested so that he could serve as a mule smuggling contraband in to other members.

These reasons support the expert opinion of jail administrators that all of those who are to be detained in the general population of a detention facility should be strip searched when they enter or re-enter it. *Id.* at 49 ("All jail personnel who testified at this trial, including plaintiffs' expert, Robert Joseph DeRosa, testified that, if they could, they

would strip search every newly arrived inmate, regardless of what brought him or her to their facility, in order to minimize the risk of introduction of contraband.").

The Supreme Court has instructed us that jailers and corrections officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547, 99 S. Ct. at 1878. It has also explained that "judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Id.* at 548, 99 S. Ct. at 1879 (citing *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S. Ct. 1800, 1807 (1974)). Decisions that carve out misdemeanor arrestees at county facilities for special treatment do not afford those who run detention facilities the "wide-ranging deference" the Supreme Court has mandated. The courts issuing those decisions have also failed to explain why misdemeanor arrestees in a county detention facility are entitled to more favorable Fourth Amendment treatment than those being detained for contempt of court or as witnesses in protective custody at a federal detention facility were afforded by the Supreme Court in *Bell*.

The decisions acknowledging *Bell* but reaching a contrary result are clothed in the language of distinction and difference, but at least one of them appeared to the author of the *Bell* decision himself to be thinly disguised defiance. In *Clements*, then Justice Rehnquist issued a stay of the decision in *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981). *Clements*, 454 U.S. at 1310, 102 S. Ct. at 288 (Rehnquist, Circuit Justice). The court of appeals had decided that the strip search of a woman who was booked into the county jail on a charge of driving while intoxicated violated the Fourth Amendment. As Justice Rehnquist saw it, the Fourth Circuit had "recited from *Bell v. Wolfish* the general standard by which searches are judged under the Fourth Amendment, but it chose to ignore the Court's application of that standard to the practice of conducting strip-searches of persons detained after being charged with a crime." *Id.* at 1309, 102 S. Ct. at 288. In lambasting what the court of appeals had done, he complained: "In short, the Court of Appeals decision reads as if *Bell v. Wolfish* had never been decided. Much as that may have been the desire of the lower court, the decision is authoritative precedent and I believe it clearly dictates a contrary result in this case." *Id.* at 1310, 102 S. Ct. at 288.[5] We

[5] The Supreme Court vacated the stay that Justice Rehnquist had issued to permit the Court to consider the certiorari petition, *Clements*, 454 U.S. 1117, 1117, 102 S. Ct. 961, 961 (1981), and then denied the petition, *Clements*, 455 U.S. 942, 942, 102 S. Ct. 1435, 1435 (1982). Our dissenting colleague finds this fact "highly salient" because of her mistaken belief that the denial of certiorari and vacation of the stay means that "Justice

Rehnquist's reading of *Bell* was rejected by the Supreme Court." Dissenting op. at 4. The implicit premise of the syllogism that informs her misunderstanding about this point is that the denial of certiorari or vacation of a stay is an indication of the Court's view on the merits. It is not.

For at least eight decades the Supreme Court has instructed us, time and again, over and over, that the denial of certiorari does not in any way or to any extent reflect or imply any view on the merits. *See, e.g., United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."); *House v. Mayo*, 324 U.S. 42, 48, 65 S. Ct. 517, 521 (1945) ("[A]s we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case."), *overruled on other grounds by Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969 (1998); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 70 S. Ct. 252, 255 (1950) (Frankfurter, J., opinion respecting the denial of certiorari) ("Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated."); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1, 93 S. Ct. 647, 650 n.1 (1973) (reiterating "the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits."); *Teague v. Lane*, 489 U.S. 288, 296, 109 S. Ct. 1060, 1067–68 (1989) ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. The variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value.") (citations, marks, and brackets omitted); *Evans v. Stephens*, 544 U.S. 942, 942, 125 S. Ct. 2244, 2244 (2005) (Stevens, J., opinion respecting the denial of certiorari) ("On several occasions in the past, I have found it appropriate to emphasize the fact that a

recognize the *Bell* decision as authoritative precedent and reach the result it dictates in this case.

D.

The strip searches of the five plaintiffs before us did not include body cavity inspections. Indeed, the full body visual searches performed on them are exactly what even the district court in *Bell* grudgingly recognized would be reasonable.[6] *See Bell*,

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denial of certiorari is not a ruling on the merits of any issue raised by the petition.").

Because the denial of certiorari implies no view of the merits, the denial or vacation of a stay that was entered to permit consideration of a certiorari petition logically cannot imply any view of the merits either. We have previously held exactly that at least twice. *Ford v. Strickland*, 734 F.2d 538, 542 (11th Cir. 1984) (reiterating that the Supreme Court's "denial of a stay pending filing and disposition of a writ of certiorari imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented.") (citation and internal marks omitted); *Ritter v. Smith*, 726 F.2d 1505, 1511 (11th Cir. 1984) (holding that the Supreme Court's vacation of a stay, like its denial of a stay, pending certiorari "imports no more than a decision to deny certiorari, which does not express any views on the merits of the claims presented," and that is true even when it was done in a co-defendant's case).

[6] Indeed, the searches of these plaintiffs came immediately after each one had taken a group shower with the other incoming detainees of the same sex and before they put on their jail jumpsuit. (R6:78:¶¶ 181–83, 238–40.) The strip searches consisted of one or more guards viewing the front and back sides of the plaintiffs' naked bodies. (*Id.* ¶¶ 183, 240.) The exposure of flesh was no greater than occurred in the shower itself. We do not think it is open to serious dispute that inmates of the same sex may be required to shower together and that guards of that sex may watch them while they are showering to prevent any misconduct. *See generally, Oliver v. Scott*, 276 F.3d 736, 746

441 U.S. at 558, 99 S. Ct. at 1884; *Wolfish*, 573 F.2d at 131; *Wolfish*, 439 F. Supp. at 148. If these plaintiffs had been strip searched after contact visits at the Fulton County Jail, instead of as part of the booking process, their claims would not have a prayer of surviving even the most cursory reading of *Bell*. Their best hope for distinguishing *Bell* lies in the fact that they were strip searched as part of the booking process instead of after contact visits.

Of course, an inmate's initial entry into a detention facility might be viewed as coming after one big and prolonged contact visit with the outside world. There is no denying that arrestees entering a detention facility usually have had plenty of contact with outsiders, most having been outsiders themselves until they were arrested. What the plaintiffs argue is that with contact visits detainees have enough notice and time to arrange for contraband to be brought to them, while that is not the case with newly arriving arrestees. Arrests, they insist, are not anticipated and as a result provide no chance for one to obtain and conceal contraband.

The factual premise of this argument is unsupportable. Not everyone who is arrested is surprised, seized, and slapped into handcuffs without a moment's notice. Some people surrender when they are notified that a warrant for them is outstanding. Those who do not turn themselves in often have

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(5th Cir. 2002); *Johnson v. Phelan*, 69 F.3d 144, 145–46 (7th Cir. 1995); *Timm v. Gunter*, 917 F.2d 1093, 1101–02 (8th Cir. 1990). It necessarily follows that this type of visual strip search is not unconstitutional.

notice that officers are coming to arrest them. Even those in a vehicle who are pulled over and arrested may have time to hide items on their person before the officer reaches the car door. Then there are those who deliberately get themselves arrested. Demonstrators or protestors engaged in civil disobedience are one example. Another example, as we mentioned earlier, is gang members who get themselves arrested just so they can smuggle in contraband. They have all the time they need to plan their arrests and conceal items on their persons.

The point is that there are plenty of situations where arrestees would have had at least as much opportunity to conceal contraband as would inmates on a contact visit, which is the situation *Bell* involved. *See Wolfish*, 439 F. Supp. at 147 ("[I]nmates and their visitors are in full view during the [contact] visits and fully clad. The secreting of objects in rectal or genital areas becomes in this situation an imposing challenge to nerves and agility.").

In conclusion, assuming that arrestees being booked into a jail or detention facility retain some Fourth Amendment rights, *see Bell*, 441 U.S. at 558, 99 S. Ct. at 1884,[7] those rights are not violated by a

[7] This assumption and our reasoning make it unnecessary to decide whether, as the defendants insist, *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984), means that inmates have no right to privacy. We do note, without endorsement or criticism, that one of our decisions concludes that jail inmates retain a right to bodily privacy that implicates the Fourth Amendment. *See Fortner v. Thomas*, 983 F.2d 1024, 1026 (11th Cir. 1993) ("As a matter of first impression in this circuit, we hold that a prisoner retains a constitutional right to bodily privacy.").

policy or practice of strip searching each one of them as part of the booking process, provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case. We also assume, of course, that the searches are not conducted in an abusive manner. Because the part of our Wilson decision finding a constitutional violation under the facts of that case, *Wilson*, 251 F.3d at 1343, is inconsistent with our reasoning here, we overrule it. We also disavow any dicta to the same effect as the Wilson decision. *See, e.g., Skurstenis*, 236 F.2d at 682.

III.

Insofar as the district court dismissed the Fourth Amendment point-of-entry strip search claims of the "the Arrestee Strip Search Class (AR Group)," we AFFIRM its decision. We REMAND the case back to the panel to apply the principles we have discussed in this opinion to the other two groups of plaintiffs in this case, which it denominated the "Alpha Strip Search Class (AL Group)" and the "Court Return Strip Search Class (CR Group)."

EDMONDSON, Circuit Judge, Concurring:

I do not write in a complaining spirit. I unhesitatingly concur in the Court's judgment and in almost all of today's Court opinion. I write separately because I think it is jurisprudentially unsound to look at a Justice's dissenting opinion to determine what the Supreme Court has decided in a case.

To the degree that our Court today seems to make some verifying use—I think unnecessarily—of this approach, I cannot join it.

BARKETT, Circuit Judge, Dissenting:

I believe the majority misreads *Bell* as justifying a balancing test that is satisfied by the mere fact that the strip searches take place in jails. The complaint alleges the automatic strip-searching, in a group, of arrestees charged with petty misdemeanors when there is no cause whatsoever to suspect the individuals of concealing contraband. No justification for these invasive searches is alleged and there are no other facts before us at this juncture to permit upholding these searches under the *Bell* balancing test. Under the longstanding, widely-held reading of *Bell*, with which I agree, the plaintiffs have stated a valid constitutional claim for a violation of the Fourth Amendment.

A. Applying the Bell *Balancing Test to the Complaint*

Like the majority, I recognize and appreciate the deference due to jail administrators as they fulfill their charge of ensuring security in jails, not only for the jail officials but also for the inmates. *See Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979). At the same time, "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Id.* at 545. This principle applies with at least as much force to individuals detained prior to their trial on petty misdemeanor charges such as failing to pay child

support, driving without a license, or trespassing. *See id.* These protections, such as the right to be free from degrading, humiliating, and dehumanizing treatment and the right to bodily integrity, include protection against forced nakedness during strip searches in front of others. *See Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) ("We have reaffirmed the privacy rights of prisoners emphasizing the harm of compelled nudity." (citing *Padgett v. Donald*, 401 F.3d 1273, 1281 (11th Cir. 2005))).[1]

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[1] Additionally, in *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992), we stated:

> It is axiomatic that a strip search represents a serious intrusion upon personal rights. In *Mary Beth G.*, the court referred to strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G.*, 723 F.2d at 1272. Another court described the indignity individuals arrested for minor offenses experience in the following manner:
>
> > The experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening. Moreover, the imposition of such a search upon an individual detained for a lesser offense is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event.

John Does 1-100 v. Boyd, 613 F. Supp. 1514, 1522 (D. Minn. 1985). One commentator has gone so far as to describe strip searches as "visual rape." *See* Shuldiner, *Visual Rape: A Look at*

I recognize that even these rights can be circumscribed given adequate cause. The question is whether there is adequate cause to permit the intrusive searches of these arrestees. The Supreme Court in *Bell* instructed the lower courts to answer that question by considering the following four factors: (1) the justification for initiating the search; (2) the scope of the particular intrusion; (3) the manner in which the search is conducted; and (4) the place in which it is conducted. 441 U.S. at 559. It did so based on a fully developed trial record, which detailed the procedure in place, the asserted justifications for the procedure, and the alleged violations of the plaintiffs' constitutional rights. *Id.* at 528, 559.

For almost thirty years, circuit courts have followed the *Bell* Court's instructions and, until today, universally held that reasonable suspicion is necessary to constitutionally justify the types of searches before us. *See Wilson v. Jones*, 251 F.3d 1340, 1343 (11th Cir. 2001); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989); *Weber v. Dell*, 804 F.2d 796, 804 (2d Cir. 1986); *Jones v. Edwards*, 770 F.2d 739, 741–42 (8th Cir. 1985); *Stewart v. Lubbock County*, 767 F.2d 153, 156–57 (5th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999) (en banc); *Hill v. Bogans*, 735 F.2d 391, 394–95 (10th Cir.

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the Dubious Legality of Strip Searches, 13 J. Marshall L. Rev. 278 (1980).

1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981).

The Supreme Court has never found it necessary to contradict the unanimous view of the circuit courts that required reasonable suspicion for strip searches over the past three decades. Quite the opposite. When the Court had the opportunity, it refused to do so. In *Logan v. Shealy*, after a trial, the Fourth Circuit enjoined a detention center from applying its blanket policy of strip-searching all booked individuals. 660 F.2d at 1013. The Fourth Circuit determined that the strip search of Logan—who was arrested for a DWI offense—had no "discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of personal rights involved, it could reasonably be thought justified." *Id.* As the majority notes, in an order staying the injunction issued by the Fourth Circuit, Justice Rehnquist, in an *individual* opinion as Circuit Justice, strongly expressed his belief that the Fourth Circuit misapplied *Bell* by failing to give proper weight to the security concerns identified by the law enforcement officials as justification for the search. *Clements v. Logan*, 454 U.S. 1304, 1309–10 (Rehnquist, Circuit Justice), *vacated*, 454 U.S. 1117 (1981). However, Justice Rehnquist's reading of *Bell* was rejected by the Supreme Court, as evidenced by the vacation of the stay and the denial of certiorari. This is highly salient because, in essence, the majority's argument

merely repackages the interpretation of *Bell* that Justice Rehnquist futilely advanced in *Clements*.

Today, the majority reads the balancing test out of *Bell* and effectively establishes a per se rule permitting automatic strip searches of all detainees, regardless of their status, in the name of security and administrative convenience. But *Bell* did not validate strip searches in detention settings per se. 441 U.S. at 559; *Roberts v. Rhode Island*, 239 F.3d 107, 113 (1st Cir. 2001) ("*Bell* has not been read as holding that the security interests of a detention facility will always outweigh the privacy interests of the detainees." (quoting *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 957 (6th Cir. 1987))); *Mary Beth G.*, 723 F.2d at 1272. Instead, the Supreme Court explained, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the *particular* search against the invasion of personal rights that the search entails." *Bell*, 441 U.S. at 559 (emphasis added). As this language makes clear, the *Bell* balancing test is case-specific and there is no general rule rendering the allegations before us inadequate to state a claim.

Nor does the fact that *Bell* upheld a blanket policy, *after a trial*, mean that the Supreme Court implicitly rejected a finding that reasonable suspicion is ever necessary to justify strip searches or strip search policies. This is too broad a constitutional principle to derive from an allegedly implicit holding of the Supreme Court. A more reasonable

interpretation would be that the Supreme Court did not need to address the issue because reasonable suspicion was present in the evidentiary record based on the detainees' planned contact with outsiders knowing they would be returning to the general population of the detention center after the visit. *Id.* at 558; *Shain v. Ellison*, 273 F.3d 56, 64 (2nd Cir. 2001) ("Second, and more important, *Bell* authorized strip searches after contact visits, where contraband often is passed.").[2] Such a reading would be consistent with the Supreme Court's description of the issue as dealing only with the need for probable cause. *Bell*, 441 U.S. at 560.

The majority also reads too much into the dissents of Justice Powell and Justice Marshall to support its argument that the Supreme Court implicitly sanctioned strip searches without reasonable suspicion. The reading more consistent with judicial rules of construction is that Justice

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[2] Reading a finding of reasonable suspicion into *Bell* is consistent with the precedent in a number of circuit courts—including our own—that have found reasonable suspicion sufficient to justify strip searches of individuals based on the nature of the charged offense that led to their arrest or other behavioral indicators. *See, e.g.*, *Hicks v. Moore*, 422 F.3d 1246, 1252 (11th Cir. 2005) ("We accept that a person's being charged with a crime of violence is sufficient to evoke reasonable suspicion that the person may be concealing weapons or contraband."); *see also Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9th Cir. 1989) (holding that reasonable suspicion existed to strip-search an inmate upon introduction to the general jail population based on nature of the charges); *Arruda v. Fair*, 710 F.2d 886, 887 (1st Cir. 1983) (upholding strip searches of inmates upon their return from the infirmary).

Powell wanted the Supreme Court to decide more than it was willing to decide, namely, to explicitly articulate a level of cause necessary to justify the searches. *See Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 715 (9th Cir. 1990) (quoting *Bell*, 441 U.S. at 563 (Powell, J., concurring in part, dissenting in part)). The *Bell* majority was willing to say that probable cause was not necessary but was unwilling to state any more than that. This silence cannot be construed to mean that the Supreme Court rejected the notion that the Fourth Amendment requires reasonable suspicion to justify strip searches of misdemeanor detainees. If the *Bell* Court had intended to restrict lower courts from making that determination, it would have just said so.

In the case before us, the majority purports to apply the *Bell* balancing test to the complaint. However, the allegations of the complaint do not include any facts that support the majority's conclusion that justification exists for the strip searches of these appellants. Facts regarding the jail administration's justification for the policy are simply absent because there is no evidentiary record at this stage. Given this absence, it is no surprise that neither the Supreme Court nor any circuit court has found constitutional this type of strip-search policy on a motion to dismiss.[3]

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[3] Several courts have noted the general problem of applying the *Bell* balancing test to affirm a dismissal of a complaint. *See, e.g., Beaulieu v. Ludeman*, No. 07-CV-1535, 2008 WL 2498241, at *12 (D. Minn. June 18, 2008) ("[T]his Court does not have before it any facts to assist it in evaluating the factors necessary

The majority says that the policy is justified on the basis of generalized security concerns, citing the records of cases that describe contraband problems of specific detention facilities other than the Fulton County Jail. Although generalized security concerns might be relevant in a *Bell* analysis, simply saying jails typically are dangerous places is not a sufficient "justification for initiating" the strip searches under *Bell*. Generalized security concerns cannot be enough to justify an infringement of such magnitude—an infringement that involves an intrusion of the most intimate sort. I believe the majority's reliance on factual findings unrelated to the specific situation at the Fulton County Jail is an abdication of our responsibility to weigh the significant competing interests—particularly the justification for the search—on the basis of specific facts.

To adequately weigh the justification for a search against the privacy concerns that *Bell* recognized, there has be an institution-specific justification for the policy. Should such justification be offered, deference might be due. There is a difference, however, between deference and abdication of our duty to perform the weighing function with which we have been charged. *See Kennedy*, 901 F.2d at 712 ("When litigants petition the federal courts to review the application of an institutional policy, the courts must proceed cautiously; the Supreme Court has sounded this warning emphatically and with considerable wisdom. Yet, at the same time, we must

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to determine if the alleged blanket strip search policy in this case is appropriate.").

be equally careful not to abdicate our function as the guardians of the Constitution.").

Indeed, the Supreme Court in *Bell* specifically noted that deference is not due when there is "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." 441 U.S. at 548 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)). Automatically strip-searching all pretrial misdemeanor detainees absent any suspicion that such detainees pose a security threat and anything indicating they were aware that they were going to be arrested is the exaggerated response which *Bell* cautioned against.[4] "[A]rrest and confinement in the [county jail] are unplanned events, so the policy could not possibly deter arrestees from carrying contraband." *Giles*, 746 F.2d at 617.

These appellees differ significantly from those in *Bell*, where the strip-searched plaintiffs had advance knowledge of their return to the general jail population after their planned interactions with outsiders. Again, as other circuit courts have recognized, the reasonable need for inspection in the *Bell* scenario is simply not present after the unplanned arrest of individuals for petty

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[4] And if, for example, Powell was such a threat, he would not have been committed to the Fulton County Jail for over twenty-four hours without being strip-searched. *See Logan*, 660 F.2d at 1013 (finding relevant that "when strip-searched, [the plaintiff] had been at the Detention Center for one and one-half hours without even a pat-down search").

misdemeanors unrelated to contraband. *See, e.g., Shain*, 273 F.3d at 64; *Roberts*, 239 F.3d at 111

("[T]he deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration."); *Giles*, 746 F.2d at 617. The majority's assertion that pretrial detainees booked on petty misdemeanor charges might anticipate their arrests or that gang members might deliberately get arrested in order to smuggle weapons and drugs into jail is unwarranted speculation in this case. *See generally Shain*, 273 F.3d at 64 ("Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something. For the exceptions—for example, a person who is allowed to visit the bathroom unescorted before an arrest—reasonable suspicion may well exist.").

It is simply unreasonable to assume that individuals arrested on misdemeanor charges not giving rise to reasonable suspicion are going about their daily lives carrying contraband in such a way as to be discoverable only by a strip search. More to the point, it is an exaggerated response to strip-search all pretrial misdemeanor detainees on the basis of this speculative concern. Although easier and more convenient to simply subject all detainees to a blanket policy, the indiscriminate strip searches before us "cannot be justified simply on the basis of administrative ease in attending to security considerations." *Roberts*, 239 F.3d at 113 (quoting *Logan*, 660 F.2d at 1013); *see also Chapman v.*

Nichols, 989 F.2d 393, 396 (10th Cir. 1993); *see generally Reno v. Flores*, 507 U.S. 292, 346 (1993) (Stevens, J., dissenting) (noting "the clear holding of our cases that 'administrative convenience' is a thoroughly inadequate basis for the deprivation of core constitutional rights"). As the Ninth Circuit noted, intermingling alone is an insufficient justification because the practice is inherently "limited and avoidable." *Giles*, 746 F.2d at 619. And, to echo the concern voiced by the First Circuit, "[t]o place so much weight on one (potentially alterable) characteristic of the state prison system would gut the balancing approach endorsed by the Supreme Court in *Bell* . . . ." *Roberts*, 239 F.3d at 113.

Moreover, the current existence of less-intrusive alternatives to strip-searching is instructive in an assessment of the strength of the justification for the strip search policy. Metal detectors would be effective in discovering metallic weapons, discounting—at least, to some degree—the safety rationale. And, in this case, Powell points to the availability of new technology that could detect nonmetallic contraband as well. Thus, assuming all else being equal, the search in the instant case is less reasonable than the one in *Bell* because of the present availability of less intrusive but equally effective means of achieving the important goal of jail safety.

The *Bell* test also requires courts to examine "the scope of the particular intrusion." *Bell*, 441 U.S. at 559. In its balancing, the *Bell* Court noted the highly intrusive nature of the strip and visual body-cavity searches. *Id.* at 560 ("We do not underestimate the

degree to which these searches may invade the personal privacy of inmates."). Even the least invasive strip search is highly intrusive. *See, e.g., Kirkpatrick v. City of Los Angeles*, 803 F.2d 485, 489–90 (9th Cir. 1986) ("[T]he fact that a strip search is conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that a strip search is a significant intrusion on the person searched.") (citation omitted); *Thompson*, 885 F.2d at 1446 ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute."). Furthermore, as our own precedent recognizes, the general harm of forced nudity is often even greater when imposed upon a misdemeanor detainee given that such treatment "is quite likely to take that person by surprise, thereby exacerbating the terrifying quality of the event." *Justice*, 961 F.2d at 192 (quoting *John Does 1-100*, 613 F. Supp. at 1522).

Turning to the remaining "manner" and "place" prongs of the *Bell* balancing test, I note that the strip searches in this case took place in rooms of 30 to 40 people as a matter of course.[5] The presence of others likewise militates against the reasonableness of the searches. *See, e.g., Masters*, 872 F.2d at 1250, 1254; *Edwards*, 770 F.2d at 742; *Hill*, 735 F.2d at 394. The majority discounts this factor by noting that

[5] In *Bell*, the policy subjected detainees to individual searches, although in practice, prisoners were sometimes searched in the presence of other inmates. *See* 441 U.S. at 577 (Marshall, J., dissenting).

detainees in the Fulton County Jail are observed during a required group shower. While the amount of exposed flesh might remain constant, the level of scrutiny surely differs when a jail official monitors the detainees during a group shower for physical altercations as opposed to when a jail official closely scrutinizes an individual for contraband during a strip search. Moreover, the observation of group showers was not at issue in this case and had never been addressed by this circuit before the majority's cursory treatment of the issue in a footnote.

B. The Detainees in the Other Groups Were Entitled to Immediate Release

Finally, the majority remands the case back to the panel to apply the principles discussed in the opinion to the Alpha Strip Search Class (AL Group) and the Court Return Strip Search Class (CR Group). Members of these groups were entitled to release and could not be legally detained any longer. *Powell v. Barrett*, 496 F.3d 1288, 1314 (11th Cir. 2007), *vacated*, No. 05-16734 (11th Cir. Feb. 1, 2008) (recognizing "the privacy interests of the AL and CR Group Plaintiffs are the same, or arguably greater than, those of arrestees because they are entitled to release and the basis for their detention at the Jail no longer exists"); *see also Cannon v. Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993). These individuals should not have been subjected to any strip search, since their detention was no longer authorized under any possible legal principle. I also would note that today's decision should not be read as foreclosing future Fourth Amendment challenges in cases where

a jail's search policy is more intrusive without a concomitant increase in the justification for the intrusion.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-16734

C. ALAN POWELL, individually, and on behalf of all others similarly situated; TORY DUNLAP, individually, and on behalf of all others similarly situated, et al.,

Plaintiffs-Appellees
Cross-Appellants,

v.

SHERIFF JACQUELINE BARRETT; Fulton County, State of Georgia; SHERIFF MYRON FREEMAN, et al.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States
District Court for the Northern District of Georgia
D.C. Docket No. 04-01100-CV-RWS-1

January 20, 2009

OPINION

Before BLACK, HULL and RYSKAMP,[*] Circuit Judges.

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[*] Honorable Kenneth L. Ryskamp, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

Eleven former detainees at the Fulton County Jail in Georgia filed a putative class action under 42 U.S.C. § 1983 challenging the Jail's strip search policy as unconstitutional. Our Court, en banc, affirmed the district court's dismissal of the Fourth Amendment point-of-entry strip search claims of the "Arrestee Strip Search Class" (AR Group), and remanded the appeal to this panel to apply the principles in the opinion to the "Alpha Strip Search Class" (AL Group) and "Court Return Strip Search Class" (CR Group). *Powell v. Barrett*, 541 F.3d 1298, 1314 (11th Cir. 2008) (en banc).

After receiving supplemental briefing from the parties, we conclude further factual development is needed before the principles enunciated in *Powell* can be applied to the AL and CR Groups. The parties (either by stipulation or evidentiary hearing) shall develop the record, including but not limited to the following.

As to the two plaintiffs in the AL Group: the time and date of entry into the jail; how long after that entry the strip search was conducted; whether the strip search was a part of the point-of-entry booking process; where the plaintiffs were kept in the jail both before and after the strip search was conducted; whether the strip search was pursuant to a blanket policy or, if not, explain; whether the strip search was conducted in the same manner as the AR Group as alleged in the Complaint; for Powell, what was the bond and at what time was it posted and by whom; for Matkin, the hour of Matkin's entry into the jail on

March 18, the hour the judicial officer dismissed the charges at the jail on March 19; whether the judicial officer ordered release or dismissed the aggravated assault charge; the process used for notifying the jail's booking section and records section of the orders of the judicial officer entered in the jail; the process for checking other outstanding detention orders, warrants or holds and how long did that process take; and the process for releasing an inmate when bond has been posted and how that relates to the point-of-entry booking process.

As to the two plaintiffs in the CR Group: how long it took for the court to enter the release order and how it was transmitted to the jail; specify where the plaintiffs were placed after their return to the jail, i.e., general population as alleged in the complaint or a holding cell or other area while the records room or appropriate staff checked for detention orders, warrants or other holds on the in-custody inmate; how long it took for the jail to check for detention orders, warrants or other holds on the CR group; whether the strip search was conducted in the same manner as the initial point-of-entry strip search (showers and visual inspection), and, if not, how it was conducted; whether the strip search was a blanket practice on all court return inmates and the jail's justifications and reasons for strip searching the plaintiffs in the CR group; given the overcrowding at the jail and the need to process out inmates who have been ordered released, why the jail places the CR inmates ordered released back into the jail's general population as opposed to segregating them for

immediate processing out of the jail if no other detention orders, warrants or holds are in place; and the length of time between the point-of-entry searches of these two plaintiffs and their second searches upon return from the court.

Thus, we remand the case to the district court to develop the facts and apply the principles discussed in this Court's en banc opinion to the facts developed.

REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-11422

C. ALAN POWELL, TORY DUNLAP, LEE ANTONIO SMITH, DAVID EVANS, STANLEY CLEMONS, II, ALLEN MIDDLETON, ANTHONY WESTBROOK, BENJAMIN BLAKE, HARRY WITHERSPOON, ANTIONNE WOLF, KRISTOPHER ALAN MATKIN, Individually, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

SHERIFF, FULTON COUNTY, GEORGIA,

Defendant-Appellee.

FULTON COUNTY, STATE OF GEORGIA, et al.,

Defendants.

Appeal from the United States
District Court for the Northern District of Georgia
D.C. Docket No. 04-01100-CV-RWS-1

March 7, 2013

OPINION

Before DUBINA, Chief Judge, HULL and ALARCÓN,[*] Circuit Judges.

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[*] Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

HULL, Circuit Judge:

In this 42 U.S.C. § 1983 action, the Plaintiffs-Appellants appeal the district court's: (1) grant of summary judgment in favor of the Defendant-Appellee, Jacqueline Barrett, in her individual capacity, based on qualified immunity; and (2) denial of their Federal Rule of Civil Procedure 56(d) motion for, *inter alia*, additional discovery. After review and oral argument, we find no reversible error in the district court's rulings and affirm the grant of summary judgment in favor of Defendant-Appellee Barrett.

I. PROCEDURAL HISTORY

Plaintiffs-Appellants Tory Dunlap, Lee Antonio Smith, David Evans, Stanley Clemons, II, Allen Middleton, Benjamin Blake, Harry Witherspoon, Antoinne Wolf, and Kristopher Alan Matkin ("Plaintiffs") were inmates at the Fulton County Jail, Atlanta, Georgia (the "Jail") at differing times as to each plaintiff but all at some time between December 2003 and May 2004 while Defendant then-Sheriff Barrett was in charge of the Jail.[1] Four of the nine remaining Plaintiffs allege they were subject to an unconstitutional visual strip search pursuant to a written Jail policy requiring such searches. Eight of the nine remaining Plaintiffs assert they were subject to an alleged practice of over-detention beyond the dates of their release. Plaintiffs allege the

[1] We note that the district court dismissed named Plaintiff Powell for failure to prosecute. Thus, he is not a party to this appeal.

visual strip searches violated their rights under the Fourth Amendment and the over-detention violated their rights under the Due Process Clause of the Fourteenth Amendment.[2]

This Court already has affirmed the district court's grant of Defendant Barrett's motion to dismiss as to other parties who were originally Plaintiffs in this case, but remanded the case to the district court for further factual development as to the Plaintiffs-Appellants here. See the extensive procedural history in: *Powell v. Barrett* ("*Powell IV*"), 307 F. App'x 434 (11th Cir. 2009) (per curiam); *Powell v. Barrett* ("*Powell III*"), 541 F.3d 1298 (11th Cir. 2008) (en banc); *Powell v. Barrett* ("*Powell II*"), 496 F.3d 1288 (11th Cir. 2007), *rev'd en banc*, 541 F.3d 1298; *Powell v. Barrett* ("*Powell I*"), 246 F. App'x 615 (11th Cir. 2007) (per curiam).

Discovery occurred between July 14, 2009 and June 24, 2010. Defendant Barrett filed the instant motion for summary judgment as to these remaining Plaintiffs' claims on November 2, 2010. On March 3, 2011, the district court granted Defendant Barrett's

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[2] Plaintiffs originally made the over-detention claims under the Fourth and Eighth Amendments, but these claims are properly analyzed under the Due Process Clause of the Fourteenth Amendment. *See Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405 (2007) (Fourth Amendment seizure occurs only when a government official "terminates or restrains" an individual's freedom of movement); *McDowell v. Brown*, 392 F.3d 1283, 1289–90 n.8 (11th Cir. 2004) (noting the overlap between the Eighth Amendment and Fourteenth Amendment standards for establishing liability under § 1983). Plaintiffs' own brief focuses on the Fourteenth Amendment.

motion for summary judgment as to the strip search claims. On February 17, 2012, the district court granted Defendant Barrett's motion for summary judgment as to the over-detention claims. Plaintiffs timely appealed both summary judgment rulings.[3]

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment on qualified immunity grounds. *West v. Tillman*, 496 F.3d 1321, 1326 (11th Cir. 2007). We resolve all material factual issues in favor of the non-moving party, Plaintiffs, and then answer the legal question of whether the moving party, Barrett, is entitled to qualified immunity. *See id.*

III. DISCUSSION

A. Qualified Immunity

"Qualified immunity shields government officials from liability for civil damages for torts committed while performing discretionary duties unless their conduct violates a clearly established statutory or

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[3] Plaintiffs also appeal the district court's denial of their Rule 56(d) motion. We review for abuse of discretion the district court's denial of a Rule 56(d) motion, and we will not overturn the district court unless the moving parties, Plaintiffs, demonstrate that the district court's ruling resulted in substantial harm to their case. *Harbert Int'l v. James*, 157 F.3d 1271, 1277 (11th Cir. 1998). After review of the Rule 56(d) issues, we conclude Plaintiffs have not shown the district court abused its discretion.

To the extent Plaintiffs-Appellants appeal other interim rulings by the district court before the two final summary judgment rulings, we conclude they have not shown any reversible error as to them either.

constitutional right." *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008). To receive qualified immunity, a government official must first establish that she acted within her discretionary authority. *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1291 (11th Cir. 2009). There is no dispute that Barrett was acting within her discretionary authority at all relevant times.

"Once discretionary authority is established, the burden then shifts to the plaintiff[s] to show that qualified immunity should not apply." *Id.* To overcome qualified immunity, Plaintiffs must show that: "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). We may consider these questions in any order. *See Ashcroft v. al-Kidd*, 563 U.S. —, 131 S. Ct. 2074, 2080 (2011).

B. The Over-Detention Claims

As for the over-detention claims, the Due Process Clause of the Fourteenth Amendment guarantees to individuals the right to be free from excessive continued detention after a jail or prison ceases to have a legal right to detain the individual. *See Cannon v. Macon Cnty.*, 1 F.3d 1558, 1562–63 (11th Cir. 1993) (holding that the Fourteenth Amendment guarantees the "right to be free from continued detention after it was or should have been known

that the detainee was entitled to release"); *Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980).[4]

A Fourteenth Amendment claim based on over-detention "must meet the elements of common law false imprisonment and establish that the imprisonment worked a violation of [F]ourteenth [A]mendment due process rights." *Cannon*, 1 F.3d at 1562–63 (footnote omitted). "The elements of common law false imprisonment are an intent to confine, an act resulting in confinement, and the victim's awareness of confinement." *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009). "To establish a due process violation, [Plaintiffs] must prove that [Barrett] acted with deliberate indifference." *Id.*

Deliberate indifference exists when a government official "(1) had subjective knowledge of a risk of serious harm; and (2) disregarded that risk; (3) by conduct that is more than mere negligence." *West v. Tillman*, 496 F.3d 1321, 1327 (11th Cir. 2007) (internal quotation marks and alterations omitted). "[D]eliberate indifference requires that the indifference be a deliberate choice, which is an exacting standard." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344 (11th Cir. 2012) (internal citations and quotation marks omitted). There is no evidence Barrett personally participated in the releases of the Plaintiff inmates here. Thus,

[4] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Plaintiffs' claims against Barrett are based on supervisory liability.

Specifically, Plaintiffs contend the Jail employees working for Barrett violated their Fourteenth Amendment rights and Barrett, as their supervisor, is liable for those officials' wrongful conduct. A supervisory official is only liable under § 1983 "for the unconstitutional acts of [her] subordinates . . . . if there is a causal connection between [her] actions and the alleged constitutional deprivation." *West*, 496 F.3d at 1328 (original alterations and internal quotation marks omitted). The necessary causal connection exists when: (1) "a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation *and he fails to do so*"; (2) "a supervisor's custom or policy results in deliberate indifference to constitutional rights"; (3) "facts support an inference that the supervisor directed the subordinates to act unlawfully"; or (4) facts support an inference that the supervisor "knew that the subordinates would act unlawfully and failed to stop them from doing so." *Cottone v. Jenne*, 326 F.3d 1352, 1360–61 (11th Cir. 2003) (internal quotation marks and citations and original alterations omitted) (emphasis added). The standard for supervisory liability is "extremely rigorous." *Id.* (internal quotation marks omitted).

Assuming without deciding that, when they were over-detained, Plaintiffs' Fourteenth Amendment rights were violated by the Jail employees, Plaintiffs have not established that Barrett is liable as a supervisor.

As for the first possible method for establishing the necessary causal connection, notice and failure to take corrective action, Barrett concedes that she was on notice of a widespread over-detention problem during the relevant period. The over-detentions were not created by Barrett but by: (1) a shortage of staff; (2) a sharp increase in the average daily Jail population owing to an influx of Atlanta Police Department arrestees; and (3) inefficient filing and communication systems of the courts. Nevertheless, the record shows that Barrett took significant corrective actions.

For example, Barrett attempted to increase the number of Jail staff processing release orders by: (1) requesting additional funds from Fulton County; (2) seeking authorization to allow civilian employees to process release orders; and (3) by requiring all department employees to work shifts at the Jail. Additionally, Barrett reformed the Jail's methods of processing release orders by: (1) posting a board in the release order processing office that displayed the number of release-eligible inmates awaiting release; (2) requiring bonding companies to arrive at specific times each day; and (3) implementing a new filing system that required records to be kept in a filing cabinet instead of in milk crates. Barrett also attempted to improve communication between the courts and the Jail by: (1) asking judges to use a standardized release order form; (2) asking judges to send all release orders to a single fax machine located at the Jail; and (3) assigning a deputy to work as a liaison between the Jail and the courts. Barrett

did these things after hiring a new Chief Jailer and tasking him with studying and improving the Jail's release operations.

Barrett's corrective measures were very similar to corrective measures that this Court previously considered in another case involving over-detention claims. *West*, 496 F.3d at 1325–26. As is the case here, in *West*, the jail supervisors admitted that they were aware of an over-detention problem. *Id.* at 1329. Because, however, the supervisory defendants acted to correct the over-detention problem, we held that they were not subject to supervisory liability under the first method described in *Cottone*. *Id.* at 1330. For example, the supervisory defendants in *West*: (1) attempted to improve channels of communication between the courthouse and the jail; (2) requested that employees work overtime; (3) shifted employees from other departments to the jail's release processing units; (4) installed new computer systems at the jail; and (5) hired new employees. *Id.* Like in *West*, Barrett's corrective measures were sufficient to rebut any showing of a causal connection between Barrett's actions and any constitutional deprivations that Plaintiffs suffered.[5]

As for the second possible method, deliberate indifference, Plaintiffs must show that Barrett's chosen custom or policy resulted in deliberate

[5] To the extent that Plaintiffs contend that Barrett is liable for a failure to train or a failure to supervise, there is no evidence in the record suggesting that Jail officials did not receive adequate training or supervision in processing release orders.

indifference to constitutional rights. *See Cottone*, 326 F.3d at 1358. This they did not do. There is no evidence that any custom or policy adopted by Barrett created the Jail's over-detention problem. Instead, as discussed above, various factors outside of Barrett's control created the problem, including: (1) a 29% increase in the Jail's inmate population caused by the Atlanta Police Department's decision to send all arrestees suspected of committing state offenses to the Jail instead of to City detention facilities; (2) understaffing in departments responsible for processing release orders; (3) delays in transmitting release orders from the Fulton County Courthouse to the Jail; (4) Jail officials' difficulties in interpreting release orders; (5) twice-weekly maintenance-related shutdowns of the Jail's computer system; and (6) the Jail, the district attorney, and the court system each using different computer systems.

As to the third and fourth methods, there is no evidence that Barrett directed any subordinates to act unlawfully and no evidence sufficient to support an inference that she knew subordinates would act unlawfully. The district court did not err in concluding that Plaintiffs failed to show a constitutional violation by Defendant Barrett personally or as a supervisor and in granting summary judgment to Defendant Barrett on Plaintiffs' over-detention claims based on qualified immunity.

C. The Strip Search Claims

In *Powell III*, this Court, en banc, (1) assumed that the Fourth Amendment protects pre-trial

detainees from unreasonable searches, and (2) concluded it does not violate the Fourth Amendment for a pre-trial detention facility to maintain a policy "requir[ing] that searches be conducted on every inmate after each contact visit [with someone from outside of the facility], even without the slightest cause to suspect that the inmate [is] concealing contraband." 541 F.3d at 1306; *see id.* at 1305–14. We held that visual strip searches of detainees—without reasonable suspicion and prior to the detainees' entering the general jail population—are constitutional. *Id.* at 1314.

Later, the Supreme Court reached the same conclusion in *Florence v. Board of Chosen Freeholders of the County of Burlington*, 566 U.S. —, 132 S. Ct. 1510 (2012), a case involving similar facts. It concluded that "[c]orrectional officials have a significant interest in conducting a thorough search as a standard part of the intake process." 566 U.S. at —, 132 S. Ct. at 1518.

There are only two types of strip search claims still remaining in the case but they both involve strip searches in connection with entry or reentry into the Jail's general population, and thus those claims fail to show a Fourth Amendment violation.

As to the first type, Plaintiffs Powell and Matkin[6] entered the Jail upon arrest and were held

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[6] Defendant Barrett argues that Plaintiffs made an over-detention claim for named Plaintiff Matkin but not a strip search claim for him. We need not resolve that issue because Matkin's strip search claim fails in any event.

in the intake area prior to their first appearance hearings conducted inside the Jail. At their hearings they were granted bond or ordered released. These inmates were not strip searched prior to their hearings. Rather, after their hearings, they were placed in the general Jail population and strip searched then. While the Plaintiffs waited in the general Jail population, the Jail staff completed the late or delayed booking process and then, as part of the release process, searched for other detention holds, warrants, or other holds.

As to the second type, Plaintiffs Evans and Wolfe were transported to state court at the Fulton County Courthouse for a hearing or other proceeding, then ordered released by a judge, and then returned to the Jail where they were strip searched before reentering the general Jail population. They were returned to their prior assigned housing units in the general Jail population to retrieve any personal belongings. The Plaintiffs had gone outside the Jail, where they potentially came into contact with providers of contraband or with possible items not allowed in the Jail.[7]

In both types of claims above, the strip searches were done before, and because, the inmates were being placed into, or back into, the general Jail population. The strip searches were not part of the release process.

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[7] Defendant Barrett articulated at least legitimate reasons for returning inmates to their assigned housing units in the general Jail population.

Further, Plaintiffs do not dispute they entered or reentered the general Jail population after these strip searches. Rather, what Plaintiffs are in effect saying is that they should not have been taken back into the general Jail population but they should have been segregated in a separate holding area in the Jail while all of the release process procedures took place, such as waiting for the court paperwork to be sent to the Jail, the Jail employees' then checking for warrants and holds, and having any personal items located and returned. Plaintiffs' challenge is really to the decision to place them in the general Jail population. However, there is no constitutional right, much less a clearly established one, to be held in a particular cell or a separate area of a Jail and not be placed back in the general Jail population.[8] Further, to the extent Plaintiffs are arguing that they were placed in the general Jail population and held too long, the district court correctly concluded that was an over-detention issue not a strip search issue.[9]

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[8] We also question whether Plaintiffs have shown that this overcrowded Jail even had adequate, separate facilities wholly apart from the general Jail population to house inmates who may be released. We need not however resolve this separate-housing issue because there was no clearly established constitutional right to separate housing shown here.

[9] For example, Matkin entered the Jail on March 18, and was ordered released on March 19 but was not released until March 23. While Matkin was held in the intake holding cell originally, his strip searched occurred right before he went to the general Jail population and he testified he remained in the general Jail population for one day.

At the end of the day, each Plaintiff here—whether after a first appearance hearing at the Jail or after court returns—was actually placed in the general Jail population and the challenged strip searches occurred due to their entering for the first time or reentering the general Jail population; thus, we conclude Plaintiffs have not shown a violation of their constitutional rights under the Fourth Amendment. Under both *Florence* and *Powell III*, jailers do not violate detainees' Fourth Amendment rights by visually searching them for legitimate safety and penological reasons prior to admitting or readmitting them to the Jail's general population.

IV. CONCLUSION

Defendant Barrett was entitled to qualified immunity as to Plaintiffs' over-detention and strip search claims. Thus, the district court properly granted Barrett's motions for summary judgment.

In light of the foregoing, we affirm.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:04-CV-1100-RWS

C. ALAN POWELL, et al.,

Plaintiffs,

v.

JACQUELINE H. BARRETT, et al.,

Defendants.

July 5, 2005

ORDER

This case comes before the Court for consideration of County Defendants' Motion for Certification of Order for Interlocutory Appeal [77-1],[1] Defendants Barrett and Freeman's Motion to Dismiss Counts in the Fourth Amended Complaint [85-1], Defendant City of Atlanta's Motion to Dismiss the Fourth Amended Complaint [87-1], County Defendants' Motion to Dismiss Plaintiffs' Fourth Amended Complaint [88-1], Plaintiffs' Consent Motion for an Extension of Time to Respond to

[1] The term "County Defendants," as used herein, refers to Fulton County and the seven members of the Fulton County Board of Commissioners.

Defendants Barrett and Freeman's Motion to Dismiss [89-1], County Defendants' Motion to Stay Discovery [92-1], Defendants Barrett and Freeman's Motion to Stay Discovery [93-1], Plaintiffs' Motion for Extension of Time to Respond to City of Atlanta's Motion to Dismiss [95-1]; Plaintiffs' Second Consent Motion for Extension of Time to Respond to County Defendants' Motion to Dismiss [101-1], and Plaintiffs' Motion for Judicial Notice [113-1].

As a preliminary matter, Plaintiffs' Consent Motion for an Extension of Time to Respond to Defendants Barrett and Freeman's Motion to Dismiss [89-1], Plaintiffs' Consent Motion for Extension of Time to Respond to City of Atlanta's Motion to Dismiss [95-1], and Plaintiffs' Second Consent Motion for Extension of Time to Respond to County Defendants' Motion to Dismiss [101-1] are GRANTED *nunc pro tunc*.[2] Likewise, Plaintiffs' Motion for Judicial Notice [113-1], being unopposed, is GRANTED. *See* LR 7.1B, NDGa ("Failure to file a response shall indicate that there is no opposition to the motion."). In accordance with its March 25, 2005 Order, moreover, the Court continues to RESERVE RULING on County Defendants' Motion for Certification of Order for Interlocutory Appeal [77-1].

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[2] Plaintiffs have additionally requested leave to exceed the page limits imposed by the local rules. Because the filings already before the Court exceed those limitations, the Court will permit Plaintiffs the requested leave, and consider their papers. As it relates to future submissions, however, Plaintiffs are strongly encouraged to focus their arguments in such a way as to bring their filings into compliance with LR 7.1D, NDGa.

The Court addresses the remaining motions before it through the following Order.

BACKGROUND

Plaintiffs, certain former detainees at the Fulton County Jail (the "Jail"), initiated this putative class action on April 21, 2004. In their Complaint, as presently amended, Plaintiffs assert claims under 42 U.S.C. § 1983 respecting the conditions of their confinement at the Jail. They complain about being subject to "blanket strip searches" upon entering and/or returning to the Jail, as well as their continued detention past scheduled release dates (a condition they refer to as "over-detention").

Specifically, Plaintiffs allege that they and others similarly situated were held at the Fulton County Jail for a number of days after they had served misdemeanor sentences, posted bond, or had been ordered released by a Fulton County Court. In some instances, the periods of over-detention allegedly suffered by members of the putative class lasted almost two weeks.

In addition, Plaintiffs assert that the Jail maintained a policy of "strip searching" all inmates without an individualized determination that such searches would reveal weapons, drugs, or other contraband. According to Plaintiffs, such searches were part of the process in which arrestees were "booked" into the Jail's general population. It involved an arrested individual being placed in a room with up to thirty or forty other arrestees, asked to remove his clothing, and instructed to place the clothing in a box. As a group, the arrestees were

required to shower, and then, standing in a line with others, were visually inspected front and back by deputies. Further, due to the Jail's practice of incorporating booking procedures into the release process, at least some of these searches were allegedly conducted on persons who were returning from court proceedings and who were entitled to be released from the facility.

Plaintiffs allege that these practices at the Fulton County Jail were pervasive and had persisted for many years. Moreover, they assert that through media coverage and published judicial decisions, the unconstitutional treatment of inmates at the Jail had grown notorious, such that the government actors who placed arrestees into the Jail's custody were aware of these alleged practices.

Plaintiffs assert that the foregoing practices violate rights guaranteed them under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, and predict that the persons falling within the proposed classes denominated in their pleadings will number 10,000 or more. As a result of exposure to such conditions, Plaintiffs seek monetary and injunctive relief against former Fulton County Sheriff Jacqueline Barrett, Fulton County Sheriff Myron Freeman, Fulton County, the members of the Fulton County Board of Commissioners, and the City of Atlanta.

On January 13, 2005, this Court entered an Order that, *inter alia*, denied two motions to dismiss that had been filed by the County Defendants and the City of Atlanta. In doing so, the Court recognized

that in order to be held liable under § 1983, a municipal body must have had control over the policy that is alleged to have violated the plaintiff's rights. Moreover, it rejected Plaintiffs' assertion that either the City of Atlanta or the County Defendants exercised sufficient control over the over-detention and strip search practices in question to be held liable under applicable precedent. Nevertheless, the Court concluded that Plaintiffs had stated a claim against these Defendants insofar as they alleged that Fulton County and the City of Atlanta, through their respective police forces, maintained a policy of entrusting arrestees to the Fulton County Jail with knowledge of the unconstitutional treatment these persons would face at the facility–a theory that will be referred to herein as that of "entrustment liability."

Thereafter, the Court permitted Plaintiffs to file a Fourth Amended Complaint. Defendants, including former Sheriff Jacqueline Barrett and Sheriff Myron Freeman, have now filed a second round of motions to dismiss. In addition, they request a stay of discovery. For their part, Plaintiffs, in their opposition papers, appear to request reconsideration of the Court's Order insofar as it declined to read a so-called "Jail Local Constitutional Amendment" as making the Fulton County Sheriff an officer of Fulton County in his capacity as administrator of the Jail.

DISCUSSION

I. *Defendants' Motions to Dismiss*

Federal Rule of Civil Procedure 12(b)(6) empowers the Court to grant a defendant's motion to dismiss when a complaint fails to state a claim upon which relief can be granted. In considering whether to grant or deny such a motion, the Court looks only to the pleadings, accepting all facts pleaded therein as true, and drawing all inferences in a light most favorable to the nonmoving party. *Cooper v. Pate*, 378 U.S. 546, 546, 84 S. Ct. 1733, 12 L. Ed. 2d 1030 (1964); *Conner v. Tate*, 130 F. Supp. 2d 1370, 1373 (N.D. Ga. 2001). The motion may be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *see Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992). Motions to dismiss are disfavored and are rarely granted. *Gasper v. La. Stadium & Exposition Dist.*, 577 F.2d 897, 900 (5th Cir. 1978); *Woodham v. Fed. Transit Admin.*, 125 F. Supp. 2d 1106, 1108 (N.D. Ga. 2000).

Here, Defendants' motions to dismiss present four broad issues. First, the Sheriffs' motion requires resolution of whether the claims against them are viable under the Eleventh Amendment and the doctrine of qualified immunity. Next, both the City of Atlanta and the County Defendants request that the Court reconsider and/or clarify the entrustment liability theory it articulated in its January 13, 2005 Order. Third, the County Defendants ask the Court

to dismiss Plaintiffs' revised "funding-based" theory of liability. Finally, the County Defendants insist that Plaintiffs lack Article III standing to bring claims for prospective injunctive relief.

A. Liability of Sheriffs Barrett and Freeman

Sheriff Myron Freeman argues that the Eleventh Amendment bars suit against him in his official capacity because, in the administration of the Fulton County Jail, he is acting as an "arm of the State." Both he and former Sheriff Jacqueline Barrett, moreover, claim that they cannot be held liable in their individual capacities for the challenged Jail practices under the doctrine of qualified immunity. For the reasons set forth below, the Sheriffs' motion is granted in part and denied in part.

1. Eleventh Amendment Immunity

It is well-settled that the Eleventh Amendment precludes a prisoner from seeking monetary damages against an officer of the state in his or her official capacity. *See Miller v. King*, 384 F.3d 1248, 1259-60 (11th Cir. 2004); *see also Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1524 (11th Cir. 1995) ("A state, a state agency, and a state official sued in his official capacity are not 'persons' within the meaning of § 1983, thus damages are unavailable[.]"). At the same time, § 1983 contemplates, and the Eleventh Amendment does not foreclose, an action against a state official in his official capacity where the plaintiff seeks only prospective, injunctive relief. *Miller*, 384 F.3d at 1260.

The parties debate the impact of these principles on the instant litigation. Plaintiffs contend that Sheriff Freeman, in applying the challenged Jail policies, acts as the instrument of the County, not the State, and that the Eleventh Amendment bar is consequently inapplicable. The Count finds this attempt to avoid the preclusive effect of the Eleventh Amendment unavailing in light of *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003), and *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), as well as the Eleventh Circuit's more recent decision in *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005), where it held:

> [In *Manders*,] we decided that a sheriff's "authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County." [Cit.] Thus *Manders* controls our determination here; [the sheriff] functions as an arm of the State—not [the] County—when promulgating policies and procedures governing conditions of confinement at the [ ] County Jail. Accordingly, even if [the plaintiff] had established a constitutional violation, [the sheriff] would be entitled to Eleventh Amendment immunity from suit in his official capacity.

400 F.3d at 1325.

Accordingly, insofar as Defendants seek a determination that the Eleventh Amendment bars suit for money damages against the Sheriff in his official capacity, their motion is granted. This

conclusion does not, however, foreclose Plaintiffs from seeking prospective, injunctive relief against the Sheriff.

2. Qualified Immunity

A considerably more difficult question is presented, however, by the Sheriffs' attempted invocation of qualified immunity. As the Eleventh Circuit explained in *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002), "[q]ualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 311 F.3d at 1346 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted).

Here, the parties dispute whether the rights Defendants are alleged to have violated were "clearly established" at the time the purported violations took place.[3] A constitutional right is clearly established

[3] The Court acknowledges that, ideally, the first inquiry to be undertaken in the qualified immunity analysis is whether the facts as alleged, viewed in the light most favorable to the plaintiff, establish a constitutional violation. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

"only if its contours are 'sufficiently clear that a reasonable official would understand what he is doing violates that right.'" *Vaughan v. Cox*, 316 F.3d 1210, 1212 (11th Cir. 2003) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). The salient question is whether the state of the law at the time of the alleged violation gave officials "fair warning" that their acts were unconstitutional. *Hope v. Pelzer*, 536 U.S.730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002); *Holmes v. Kucynda*, 321 F.3d 1069, 1078 (11th Cir. 2003); *see also Vinyard*, 311 F.3d at 1350-53 (articulating a tripartite analytical framework for ascertaining whether right at issue was "clearly established").

In answering this question, the Eleventh Circuit has instructed district courts to look to its decisions, those of the United States Supreme Court, and those of the highest court in the relevant state. *Marsh v. Butler County*, 268 F.3d 1014, 1033 n.10 (11th Cir. 2001); *but cf. Grayden v. Rhodes*, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (recognizing that decisions by the United States Supreme Court have suggested that looking to decisions of other Circuits is appropriate in

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Here, however, Defendants have neglected to fully brief this "threshold" question, and the Court is reluctant to rule on the precise contours of the rights at issue in this litigation without the benefit of hearing complete argument from both sides. As a consequence, it will assume for purposes of the instant motion that Plaintiffs have sufficiently alleged a constitutional violation, and addresses only the question whether the rights purportedly violated were "clearly established" within the meaning of pertinent authority.

qualified immunity analysis) (Birch, J., concurring in part and dissenting in part). Qualified immunity is a question of law for the court. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993).

a. Strip Search Policy

Plaintiffs contend that, at all times relevant to this litigation, their right to be free from a blanket strip search policy was clearly established. In support of this position, they rely principally on the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and the decision of the Eleventh Circuit in *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001). Given the importance of precedent in determining whether a right is sufficiently "clear" to warrant the denial of qualified immunity, and in light of the dynamic nature of the law as it relates to inmate strip searches, the Court examines these and other pertinent decisions in some detail below.

In *Bell*, the Supreme Court was called upon to examine the constitutionality of certain jail policies affecting pretrial detainees, including a policy requiring such persons "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." 441 U.S. at 558. The defendants argued that such searches were justified, without probable cause, both to discover and to deter attempts to smuggle contraband into the general population. *Id.* Upholding the practice under constitutional attack, the Court explained that the Fourth Amendment requires courts to balance the

need for a given search against the invasion of personal rights the search entails, considering "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 559. Addressing the case before it, it concluded:

> We do not underestimate the degree to which these searches may invade the personal privacy of inmates. Nor do we doubt, as the District Court noted, that on occasion a security guard may conduct the search in an abusive fashion. [Cit.] Such an abuse cannot be condoned. The searches must be conducted in a reasonable manner. [Cit.] But we deal here with the question whether visual body-cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the inmates, we conclude that they can.

Id. at 560 (emphasis in original).

More than twenty years later, in *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001), the Eleventh Circuit applied the *Bell* analysis to a case involving a strip search of a woman arrested for driving under the influence. The plaintiff in *Wilson*, before being taken to her cell, was escorted to a restroom in the jail by a female corrections officer and "instructed . . . to disrobe completely, face the wall, squat, spread her buttocks, and cough three times." 251 F.3d at 1341.

In addition, while no body cavity search was performed below the *Wilson* plaintiff's waist, the corrections officer examined the woman's "ears, mouth, nose and breasts during the search." *Id.*

Relying on *Bell*, the Circuit, employing a fact-specific balancing test, determined that the Jail's policy was unconstitutional because it had been conducted in the absence of a "reasonable suspicion that [the plaintiff] was concealing weapons or any other type of contraband." *Id.* at 1343. Nevertheless, it declined to deny the defendants qualified immunity, recognizing material dissimilarities between the facts before it and those reflected in binding precedent. *Id.* at 1344-46.[4]

Two years after *Wilson*, the Eleventh Circuit once again had the opportunity to review the constitutionality of a strip search performed on pretrial arrestees. In *Evans v. City of Zebulon*, 351 F.3d 485 (11th Cir. 2003) (hereinafter, "*Evans I*"), two young men were arrested while driving through the city of Zebulon, Georgia; one for speeding and refusing to submit to a breathalyser test, the other based on mistaken identity and the resultant belief he had violated parole. 351 F.3d at 487-88. Upon

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[4] In affording the defendants qualified immunity in *Wilson*, the Eleventh Circuit engaged in a "materially similar" comparison of relevant precedent to the record before it. This rigorous precedential comparison for determining whether a defendant acted in violation of a claimant's "clearly established" rights has since been criticized by the Supreme Court. *Hope v. Pelzer*, 536 U.S.730, 740, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002).

arriving at the county jail, the two men were subjected to strip searches which involved an examination and prodding of their anus and genitals with a slender black object. *Id.* at 488-89.

Addressing the constitutionality of the search, the Eleventh Circuit explained, "Arrestees who are to be detained in the general jail population can constitutionality be subjected to a strip search only if the search is supported by reasonable suspicion that such a search will reveal weapons or contraband." *Id.* at 490. Because the Court found such a reasonable suspicion lacking, it held that the plaintiffs' constitutional rights had been violated. *Id.* at 490-92. Nevertheless, it granted the officer involved in the search qualified immunity. *Id.* at 495-96.

Shortly after the *Evans I* panel issued its decision, the Circuit voted to vacate the opinion and rehear the appeal *en banc*. *Evans v. City of Zebulon*, 364 F.3d 1298 (11th Cir. 2004). On rehearing, the Court of Appeals likewise found certain characteristics of the search unconstitutional, but concluded that the officer was not entitled to qualified immunity with respect to the allegedly abusive manner in which the search was conducted. *See Evans v. City of Zebulon*, 407 F.3d 1272 (11th Cir 2005) (*en banc*) (hereinafter, "*Evans II*"). The most important aspect of the *Evans II* decision for purposes here, however, was not this result, but rather the following language in which the Circuit questioned the "standard" initially articulated by the panel in *Evans I*:

> The panel opinion in this case included these words: "Arrestees who are to be detained in the general jail population can constitutionally be subjected to a strip search only if the search is supported by reasonable suspicion that such a search will reveal weapons or contraband." [Cit.] And these words doubtlessly contributed to causing some judges to vote for en banc rehearing.
>
> *Most of us are uncertain that jailers are required to have a reasonable suspicion of weapons or contraband before strip searching—for security and safety purposes—arrestees bound for the general jail population.*

407 F.3d at 1278. The Circuit went on to observe that the Supreme Court had never imposed such a "reasonable suspicion" prerequisite on inmate strip searches, but stopped short of resolving the accuracy of the panel's earlier statement. Rather, it explained that the case before it "involve[d] a different kind of search altogether: a post-arrest investigatory strip search by the police looking for evidence (and not weapons)." *Id.* at 1279.

In a concurring opinion, Judge Carnes, joined by Judge Dubina and Judge Hull, went further and expressed his "view is that reasonable suspicion is *not necessary* for a strip search of an arrestee who is to be detained in the general jail population, if that search is conducted pursuant to a generally applicable, reasonable jail policy designed to promote

safety and security by guarding against the smuggling of weapons and other contraband into a detention facility." *Id.* at 1284 (Carnes, J., concurring; emphasis supplied). These Judges recognized that "a strong argument can be made" that decisions holding to the contrary, including that authored by the panel in *Wilson v. Jones*, were "wrong," and were predicated on a misinterpretation of *Bell*. *Id.* at 1285.

In light of the foregoing, the Court's task here is to determine whether the "strip search" policy allegedly in place at the Fulton County Jail violated clearly established rights of detainees at the time the searches were purportedly performed (*i.e.*, in 2003 and 2004). Needless to say, the broad pronouncements in *Wilson* and *Evans I*, contrasted with the *en banc* Court's election to vacate Evans I and subsequent reluctance in *Evans II* to impose a "reasonable suspicion" precondition on strip searches of arrestees bound for the general population, introduces a novel and awkward wrinkle into this determination. After carefully considering the issue, however, the Court is inclined to agree with Sheriffs Barrett and Freeman that they are entitled to qualified immunity with respect to the challenged searches.

As the *en banc* Court of Appeals emphasized in *Evans II*, the Supreme Court has never expressly held that, before conducting a strip search of detainees bound for the general jail population, a jailer must possess a reasonable suspicion of the concealment of weapons or other contraband. *See*

Evans II, 407 F.3d at 1279. Moreover, in *Evans II*, a majority of the Court of Appeals indicated its uncertainty regarding whether such a suspicion must precede any constitutional strip search. *Id.* at 1278. Admittedly, that opinion was issued after the challenged strip searches involved in this litigation allegedly took place. But if the majority of the Eleventh Circuit continues to perceive room to debate the contours of this constitutional right, it seems to this Court that no state official could justifiably be charged with having "fair warning" that conducting a strip search absent a reasonable suspicion of contraband violates the law. *See Hope*, 536 U.S. at 740. Put another way, this Court cannot characterize a state official's doubt in the existence of a constitutional rule "unreasonable" if his uncertainty is shared by a majority of the Eleventh Circuit Court of Appeals. *Vaughan*, 316 F.3d at 1212 (11th Cir. 2003) (a right is clearly established "only if its contours are 'sufficiently clear that a reasonable official would understand what he is doing violates that right.'") (*quoting Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

In making this determination, the Court is aware that certain language in *Wilson* could be read as supporting a different result. *See* 251 F.3d at 1343 ("*Because Wilson was strip searched absent reasonable suspicion*, we hold that the search of Wilson, as well as the jail's policy authorizing her search, violated the Fourth Amendment prohibition against unreasonable searches and seizures.")

(emphasis supplied). Nevertheless, a thorough reading of the *Wilson* opinion underscores that the constitutionality of any challenged strip search hinges on a fact-intensive inquiry—one in which a court is required to "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 1342 (*quoting Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979).). That being the case, any "lesson" to be taken from *Wilson* cannot be divorced from the facts of that case, including the invasiveness of the search at issue there.

Thus, this Court finds it relevant that, in *Wilson*, the plaintiff had her breasts examined, and was required to "squat, spread her buttocks, and cough . . . ." *See* 251 F.3d at 1341. Here, by contrast, Plaintiffs' pleading describes a markedly less invasive examination. Plaintiffs were simply required to submit to a visual "front and back" inspection upon leaving a shower. It is the view of this Court that such a pronounced dissimilarity between the intrusiveness of the searches at issue here in and *Wilson* could lead a reasonable official to believe one search is constitutional, while the other is not.[5]

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[5] Plaintiffs cite *Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y. 2005), to support a contrary view. There, the District Court for the Northern District of New York considered, and ultimately rejected, an argument that no "strip search" had been performed on inmates where they were made to disrobe in front of guards. 227 F.R.D. at 168-69. The court read Second Circuit precedent as foreclosing a definition of a "strip search" as limited to those which targeted singularly private parts of

Insofar as Sheriffs Barrett and Freeman seek qualified immunity on Plaintiffs' "strip search" claims, their motion to dismiss is granted.[6]

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the body. *Id.* at 169 ("Defendants contend that the Second Circuit has determined that in order to be constitutionally problematic, a strip search must target the breast, genitals, and anus . . . . This misstates the law of this Circuit."). This Court, however, does not find that *Marriott* advances Plaintiffs' qualified immunity argument. That decision, issued after the searches at issue here took place, could not have apprised Sheriffs Barrett and Freeman of the outer limits embodied in the concept of a "strip search," and the Eleventh Circuit has squarely rejected the proposition that judicial decisions outside this Circuit can "clearly establish" principles of law for those officials who operate within its boundaries. *See Marsh*, 268 F.3d at 1033 n.10.

[6] To be clear, this holding applies with equal force to the Plaintiffs and putative class members who fall or would fall into the so-called Alpha Arrestee Strip Search Class and Court Return Strip Search Class. These persons, according to the Fourth Amended Complaint, had obtained the status of "releasees" at the time the challenged search was performed—whether by court order or the posting of bond. It is Plaintiffs' position that there is no reason why these individuals should have to be put back into the Jail's general population prior to their release, and thus, that subjecting them to the strip search procedure that precedes reentry into that population is uniquely offensive.

In fairness to Plaintiffs, the Court appreciates that any need to conduct the challenged searches may be significantly diminished in these instances, and acknowledges that the status of the inspected persons may prove germane to the ultimate constitutional inquiry. Plaintiffs have not, however, directed the Court to any United States Supreme Court, Eleventh Circuit, or Georgia Supreme Court authority compelling a finding of unconstitutionality on these facts, and absent such authority, this Court cannot deem the rights Plaintiffs seek to vindicate *vis-a-vis* these subclasses any more

b. Over-Detention

Sheriffs Barrett and Freeman likewise seek to invoke qualified immunity on Plaintiffs' "over-detention" claims. They argue that case law within this Circuit does not establish a concrete deadline by which an arrestee who is entitled to be released (*e.g.*, because he has posted bond, served his misdemeanor sentence, or been ordered released by a court) must be permitted to leave the jail. In the absence of such an indelible, "bright line" standard, the Sheriffs argue their obligation to release inmates in a timely fashion cannot be described as "clearly established." The Court disagrees.

As the Supreme Court explained in *Hope v. Pelzer*, the fundamental question in the qualified immunity analysis is whether the state of the law provided an official with "fair warning" that his treatment of the plaintiff ran afoul of the Constitution. *See Hope*, 536 U.S. at 740. While materially similar precedent or "broad statements of principle" can unquestionably establish a right with sufficient clarity to deny an officer qualified immunity, they are not in all instances required to provide officials with the requisite notice. *See Vinyard*, 311 F.3d at 1350-52. Rather, in some cases, "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful." *Id.* at

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"clearly established" than those of the remaining putative class. *See Marsh*, 268 F.3d at 1033 n.10.

1350. To borrow language from a slightly different context, there are some instances where the conduct in question goes so far beyond the "hazy border" of constitutionally permissible behavior that an official should be denied qualified immunity even absent materially similar precedent. *See id.* at 1350 n.18.

As it relates to the instant case, there can be no doubt that a detainee has a "constitutional right to be free from continued detention after it was or should have been known that [he] was entitled to release . . . ." *See Cannon v. Macon County*, 1 F.3d 1558, 1563 (11th Cir. 1993), *modified*, 15 F.3d 1022 (1994); *see also Whirl v. Kern*, 407 F.2d 781, 791 (5th Cir. 1969) ("There is no privilege in a jailer to keep a prisoner in jail beyond the period of his lawful sentence.").[7] While the Constitution does not mandate instantaneous release, it does require that a detainee be released within a *reasonable* time after the basis for his lawful detainment has ended. *See Whirl*, 407 F.2d at 792 ("The sheriff, of course, must have some protection too. His duty to his prisoner is not breached until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained."); *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988) ("We recognize that the administrative tasks incident to a release of a prisoner from custody may require some time to

[7] The U.S. Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the U.S. Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

accomplish—in this case perhaps a number of hours."); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 55, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991) (Fourth Amendment required that persons arrested without warrant be given prompt judicial determinations of probable cause; establishing forty-eight hour standard to assess reasonableness of delay in light of inevitable administrative hurdles).[8]

Plainly, within a given range, what is "reasonable" as it relates to a particular individual's release presents a fact-specific question. *See, e.g., Berry v. Baca*, 379 F.3d 764, 770-72 (9th Cir. 2004) (rejecting county sheriff's argument that release delays lasting up to forty-eight hours are presumptively reasonable; held twenty-nine hour delay presented question for jury); *Lewis*, 853 F.2d at 1370 (recognizing that "[i]t is virtually impossible to establish an absolute minimum time to meet all potential circumstances which might exist" in the context of inmate release; holding eleven-hour delay presented question for the jury); *Arline v. City of*

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[8] As explained *supra*, note 3, the Court declines at this juncture to resolve the outer boundaries of the constitutional right to be free from over-detention without the benefit of hearing full argument from the parties in this litigation. That is, it declines to resolve whether the standard announced by the Supreme Court in *McLaughlin*, or some more stringent analysis, should apply when an individual challenges his continued detention beyond the expiration of the government's right to hold him. Nevertheless, the Court does not believe the case law leaves any room to doubt the existence of an individual's constitutional right to be released from detention within a reasonable time after it is or reasonably should be known that he is entitled to such release.

Jacksonville, 359 F. Supp. 2d 1300, 1310 (M.D. Fla. 2005) (two and a half hour detention following acquittal presented jury question under Fourth Amendment). Equally as plain is that there are circumstances in which a lengthy delay is *per se* unreasonable, and necessarily runs afoul of the Fourth Amendment. *See, e.g., Douthit v. Jones*, 619 F.2d 527, 532 (5th Cir. 1980) ("Detention of a prisoner thirty days beyond the expiration of his sentence in the absence of a facially valid court order or warrant constitutes a deprivation of due process.").

Here, Plaintiffs claim to have been over-detained for durations ranging from one to ten days, with a mean over-detention period of 3.90 days.[9] (*See* Fourth Am. Compl. ¶¶ 328, 334, 340, 345, 351, 357, 363, 369, 375, 381 & 387.) In describing an "illustrative case," moreover, Plaintiffs allege that Plaintiff Alan Powell was told by guards that if he continued to complain about his over-detention, they might "lose" his paperwork—presumably intimating that a problem arrestee could be detained for longer periods of time for reasons totally unrelated to the administrative process incident to effectuating releases. (Fourth Am. Compl. ¶ 242.) It is the view of this Court that such

[9] Plaintiff Alan Powell claims to have been over-detained for three days; Plaintiff Tory Dunlap for four days; Plaintiff Lee Antonio Smith for three days; Plaintiff David Evans for ten days; Plaintiff Stanley Clemons for two days (as of the filing of the Second Amended Complaint); Plaintiff Allen Middleton for three days; Plaintiff Anthony Westbrook for four days; Plaintiff Benjamin Blake for two days; Plaintiff Henry Witherspoon for seven days; Plaintiff Antionne Wolf for one day; and Plaintiff Kristopher Matkins for four days.

allegations, if proven, might preclude the Sheriff's invocation of qualified immunity on Plaintiffs' "over-detention" claims.

In what has been recognized as a "clearly analogous" line of authority, the Supreme Court has established a presumptive deadline of forty-eight hours for persons arrested without a warrant to be taken before a judge for a probable cause hearing. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 55, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991); *see also Lewis*, 853 F.2d at 1370 (recognizing that circumstances presented in case involving "over-detention" of inmate and *McLaughlin* were "clearly analogous"). An arrestee who is provided a hearing within that time period can prevail on a constitutional challenge only if he demonstrates the hearing was nonetheless "delayed unreasonably." *McLaughlin*, 500 U.S. at 56. Among the delays that may be considered unreasonable are those "motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* Conversely, "[w]here an arrested individual does not receive a probable cause determination within 48 hours . . . , the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.* at 57. In cases arising after *McLaughlin*, moreover, courts have recognized that an official may be denied qualified immunity where arrestees under his supervision was not given a probable cause determinations within forty-eight hours of arrest and no emergency or extraordinary circumstances justified the delay. *See, e.g.,*

Cherrington v. Skeeter, 344 F.3d 631, 643-44 (6th Cir. 2003) (reversing summary judgment in favor of defendants on grounds of qualified immunity where arrestee held for seventy-two hours without probable cause determination and no emergency or extraordinary circumstances justified delay); *Lingenfelter v. Bd. of County Comm'rs of Reno County*, 359 F. Supp. 2d 1163, 1173 (D. Kan. 2005) (denying sheriff's motion to dismiss on grounds of qualified immunity where inmate was held eight days without judicial probable cause determination).

Of course, the issue presented in *McLaughlin* is not in all respects identical to that presented here. *See Berry*, 379 F.3d at 771 (observing that, "while the two contexts share the same concerns about the need for flexibility in the face of inevitable administrative and logistical delays," issues of over-detention and detainment pending probable cause determination "may not share the same precise calculus"). Nevertheless, in circumstances where a detainee is unquestionably entitled to be free from further governmental restraint, it cannot be doubted that the public interest in his prompt release is even greater, and the constitutional tolerance for "administrative delay" substantially less, than in the context of arrestees awaiting probable cause determinations. *See Berry*, 379 F.3d at 771-72 (declining to adopt *McLaughlin*'s presumption that forty-eight hour detention is constitutional in context of over-detentions, explaining that, in over-detention context, "the societal interest in the process that result in delay, while significant, may not be as

weighty as in the probable cause context[,]" and that, "the administrative burden of accelerating the release process—in particular, running a computer check on wants and holds within less than forty-eight hours–does not seem as weighty as the burden of establishing probable cause under a tight timeline"); *Brass v. County of Los Angeles*, 328 F.3d 1192, 1202 (9th Cir. 2003) ("It is unclear, however, whether the 48-hour period applied to probable cause determinations is appropriate for effectuating the release of prisoners whose basis for confinement has ended. One might conclude that when a court orders a prisoner released—or when, for example, a prisoner's sentence has been completed—the outer bounds for releasing the prisoner should be *less than* 48 hours.") (emphasis supplied).[10] It follows that an official who continues to hold a detainee without legal justification for a period of time that would fail to pass muster even under *McLaughlin* cannot be

[10] Ironically, this Court's review of applicable precedent reveals that *Brass* held constitutional one of the longest "over-detention" delays in reported authority (outside the realm of "mistaken identity" cases)–a delay which lasted 39 hours after a court had ordered the detainee's release. *See* 328 F.3d at 1202. As the Ninth Circuit has observed in subsequent decisions, however, *Brass* was unique in that the detainee there did not challenge the overall length of his delay, but rather, isolated administrative practices he found objectionable. *See Berry*, 768-69. Because the *Brass* court considered only the reasonableness of the challenged *procedures*, rather than whether the aggregate resultant delay evinced deliberate indifference to the detainee's rights, it stands on a different footing than this and most other "over-detention" controversies.

said to have lacked "fair warning" that his conduct violates the Constitution.

Here, the allegations of the Complaint describe a lethargy in the Jail's release policies that could be said to exist well beyond the "hazy border" of constitutionally acceptable delay. The Court has been unable to find any case, whether within or outside of the Eleventh Circuit, in which the detainment of a properly identified individual for *days* beyond his scheduled release date was held constitutionally permissible. And, read most favorably to Plaintiffs, the allegations of the Complaint suggest that the delays at issue here may have in some instances been the product of more than a mere lack of organization, but rather, indicative of a custom of purposeful indifference to the rights of detainees—"motivated by ill will against the arrested individual, or delay for delay's sake." *McLaughlin*, 500 U.S. at 56. Accordingly, based on the arguments and record currently before the Court, dismissal of Plaintiffs' over-detention claims on qualified immunity grounds would be improper.

B. Entrustment Liability

The County Defendants and the City of Atlanta also move the Court to reconsider, or, in the alternative, to clarify its January 13, 2005 holding regarding "entrustment liability."[11] The Court

[11] The City of Atlanta apparently requests reconsideration on other aspects of the Court's January 13, 2005 Order as well, having incorporated in their current motion to dismiss many arguments that were already considered, and rejected, by the

addresses the requests for reconsideration and clarification separately.

1. Reconsideration

Under the Local Rules of this Court, "[m]otions for reconsideration shall not be filed as a matter of routine practice." LR 7.2(E), NDGa. Consequently, motions for reconsideration are not to be submitted as a matter of course, but only when "absolutely necessary." *Id.* Such absolute necessity arises where there is "(1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003).

Conversely, motions for reconsideration may not be used as a vehicle to present the court with arguments which have already been raised and rejected, or to "repackage familiar arguments to test whether the court will change its mind." *Bryan*, 246 F. Supp. 2d at 1259. Likewise, such motions "may not be used to offer new legal theories or evidence that could have been presented in conjunction with the previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation." *Adler v. Wallace Computer Servs., Inc.*, 202 F.R.D. 666, 675 (N.D. Ga. 2001).

Here, Defendants' arguments in support of reconsideration do not fall within the limited range of

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Court. For all the reasons stated in subsection 1, *infra*, that request is denied.

objections that may appropriately be raised in such a motion. Further, the Court remains of the view that a municipal body that maintains a policy of entrusting its arrestees to a jail with knowledge of the unconstitutional treatment those persons will face upon their confinement there can be liable under § 1983. *See Young v. City of Little Rock*, 249 F.3d 730, 735 (8th Cir. 2001) (holding that city that entrusted its arrestees to county with knowledge of unconstitutional practice at issue could be held liable under § 1983 for injury arising out of arrestee's exposure to the practice); *Deaton v. Montgomery County*, 989 F.2d 885, 889-90 (6th Cir. 1993) (in declining to hold county liable under § 1983 for city's unconstitutional practices in treatment of arrestees, emphasized that "[t]here are no facts presented indicating that the sheriff knew or should have known that strip searches were conducted in violation of state law"); *cf. also Warren v. D.C.*, 353 F.3d 36, 39 (D.C. Cir. 2004) (holding that District of Columbia could be liable § 1983 for entrusting inmate to private prison with "actual or constructive knowledge that its agents will probably violate constitutional rights"); *Baker v. D.C.*, 326 F.3d 1302, 1306-07 (D.C. Cir. 2003) (holding likewise). The motions for reconsideration are denied.

2. Clarification

The County Defendants additionally request that this Court clarify its January 13, 2005 holding as it relates to the showing necessary to prevail on a theory of entrustment liability. In particular, they ask whether the "knowledge" a municipality must

have to be liable under § 1983 is limited to the facts giving rise to the constitutional violation, or whether it additionally must be chargeable with knowledge of the *unconstitutionality* of the challenged practice. They assert that if the latter is required, then the legal landscape at the time the events in question took place here did not provide them with the requisite notice (a concept they insist must be construed akin to the "clearly established" test for qualified immunity) to sustain their liability under an entrustment-based theory.

This Court is inclined to agree with the County Defendants that knowledge—either actual or constructive—of the unconstitutionality of a challenged practice employed by a recipient government actor must exist before § 1983 liability may attach. *See Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 405, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused [another] to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of [others]."); *cf. also id.* at 411 ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."); *City of Canton v. Harris*, 489 U.S. 378, 396, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (U.S. 1989) ("Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive

notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied.") (O'Connor, J., concurring in part and dissenting in part); *Warren*, 353 F.3d at 39 ("[F]aced with actual or construction knowledge that its agents will probably violate constitutional rights, the city may not adopt a policy of inaction.").

At the same time, however, the Court cannot agree with the County Defendants that Plaintiffs have failed to state a claim for relief when this "legal knowledge" requirement is incorporated into the entrustment liability test. Read in the light most favorable to Plaintiffs, the Fourth Amended Complaint contains allegations that the County Defendants had *actual knowledge* that the challenged practices at the Fulton County Jail were unconstitutional. (*See, e.g.*, Fourth Am. Compl. ¶ 232.) Were these allegations proven, then the County Defendants have directed the Court to no authority that would permit them to avoid § 1983 liability.[12]

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[12] Of course, the Court's holding that the rights of the "strip search" plaintiffs were not established with sufficient clarity to deny the defendant actors qualified immunity presents an arduous hurdle for Plaintiffs to overcome in succeeding on a theory of entrustment liability. This Court is not presently prepared, however, to entirely conflate the standard for constructive notice in the entrustment liability context with that employed in deciding whether a right is "clearly established" for purposes of qualified immunity. Given the procedural posture of this case, moreover, that issue is not before the Court.

C. Plaintiffs' Revised Funding-Based Theory of Liability

In their Fourth Amended Complaint, Plaintiffs renew their attempt to impose § 1983 liability on Fulton County based on the County's control over the Fulton County Sheriff's budget, this time infusing their allegations with accusations of deliberate indifference. The Court finds this theory foreclosed by Eleventh Circuit precedent.

As explained in this Court January 2005 Order, the Eleventh Circuit, after a thorough examination of the relationship between the State of Georgia, its counties, and its sheriffs, flatly rejected the argument that a county's authority over a sheriff's budget can justify imposing liability on the county as a consequence of policies adopted by the sheriff. *See Manders*, 338 F.3d at 1323-24; *see also Grech*, 335 F.3d at 1339-40. Although it recognized a different result might be appropriate where a county's *own* duty to provide medical care to inmates was at issue, the provision of such care is not implicated by Plaintiffs' claims in this case. *See Manders*, 338 F.3d at 1323 n.43 ("We stress that this case does not involve medical care, which counties have a statutory obligation to provide to inmates in county jails.") (*citing* O.C.G.A. § 42-5-2); *compare McDowell v. Brown*, 392 F.3d 1283 (11th Cir. 2004) (considering deliberate indifference challenge to Georgia county's alleged under-funding of jail that was asserted to have resulted in its heath services subcontractor's failure to treat inmate's medical condition). Consequently, the Court finds Plaintiffs' revised

funding-based theory of liability unavailing. Count 16 of Plaintiffs' Fourth Amended Complaint is dismissed.

D. Plaintiffs' Standing to Pursue Injunctive Relief

Finally, the County Defendants challenge Plaintiffs' standing to pursue equitable relief in this case.

> It goes without saying that those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. [Cits.] Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. [Cit.] Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

City of Los Angeles v. Lyons, 461 U.S. 95, 101-102, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983). Where injunctive relief is at issue, moreover, "to have standing . . . a plaintiff must show a sufficient likelihood that he will be affected by the allegedly

unlawful conduct in the future." *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1283 (11th Cir. 2001). "Although past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury . . . , past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects." *Id.* at 1284 (internal punctuation omitted).

These principles often prove problematic for former detainees seeking to enjoin conditions attendant to their arrest and confinement. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) (equitable standing lacking where "the prospect of future injury rests on the likelihood that respondents will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners"); *cf. also Lyons*, 461 U.S. at 109 (explaining that it was "no more than speculation" that plaintiff would once again be arrested and subjected to allegedly unlawful chokehold); *Dudley v. Stewart,* 724 F.2d 1493, 1494 (11th Cir.1984) ("Since Dudley is no longer in the custody of county jail officials, the most that can be said for his standing is that if he is released from prison, is convicted of another crime and is incarcerated in the Daugherty County Jail, he might again be subject to disciplinary confinement without due process."). Indeed, the Supreme Court has appeared singularly unwilling, "for purposes of assessing the likelihood that state authorities will

reinflict a given injury . . . to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320, 108 S. Ct. 592, 98 L. Ed. 2d 686 (U.S. 1988) (collecting cases).

While acknowledging that most of their ranks had been released at the time the complaint in this case was filed, Plaintiffs attempt to avoid this standing obstacle here by focusing on three of the eleven named Plaintiffs. First, they concentrate on the claims of Mr. Powell and Mr. Blake, explaining that both men have been arrested by Fulton County Police since the original complaint was filed in April 2004: Mr. Blake once, and Mr. Powell three times. They urge that these arrests (as well as the fact that Mr. Powell remains out on bond, and that Mr. Blake is on probation) show a substantial likelihood that these men will again be detained at the Fulton County Jail and will again face allegedly unconstitutional conditions of confinement.

Admittedly, there exists some language in Supreme Court precedent intimating that a plaintiff who, prior to filing his complaint, has multiple "run-ins" with police might be able to show a sufficient likelihood of future police encounters to be able to pursue injunctive relief against an unconstitutional law enforcement practice. *See Lyons*, 461 U.S. at 108 ("We cannot agree that the 'odds[ ]' . . . that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief. *We note that*

five months elapsed between October 6, 1976, and the filing of the complaint, yet there was no allegation of further unfortunate encounters between Lyons and the police.") (emphasis supplied). That said, Plaintiffs have directed the Court to no authority actually holding that a civilian claimant's potential for recidivism was so high that it took his future arrest and detainment out of the realm of the hypothetical, laying the foundation for equitable standing. *Compare 31 Foster Children v. Bush*, 329 F.3d 1255, 1266 (11th Cir. 2003) (in suit by foster children challenging conditions of foster care system, held children who were in custody of system had standing, explaining, plaintiffs "are in the custody of the defendants *involuntarily* . . . [and t]hey *cannot* avoid exposure to the defendants' challenged conduct"); *Church v. City of Huntsville*, 30 F.3d 1332, 1337-38 (11th Cir. 1994) (explaining presumption that person will not engage in misconduct placing him at risk of injury does not preclude standing "when, for reasons *beyond the plaintiff's control*, he or she is *unable* to avoid repeating the conduct that led to the original injury at the hands of the defendant"; citing as examples mental illness and homelessness) (emphasis supplied); *Cruz v. Hauck*, 627 F.2d 710, 717 (5th Cir. 1980) (prisoners' claim attacking unconstitutional jail policies was not moot for purposes of class certification, even though they were not in jail at time of class certification decision, where they could easily be transferred *from prison* back to jail). This Court declines to extend precedent to find such a foundation here. Next, Plaintiffs emphasize that Mr. Clemons was still in Fulton

County Jail at the time the Second Amended Complaint—which added him as a Plaintiff—was filed. Clearly, his case places him in a much stronger position to pursue injunctive relief in this litigation. *See McLaughlin*, 500 U.S. at 51 (holding former inmates had standing to pursue injunctive claims against county where "at the time the second amended complaint was filed, plaintiffs James, Simon, and Hyde had been arrested without warrants and were being held in custody without having received a probable cause determination"); *see also Wooden*, 247 F.3d at 1285 n.21 (distinguishing *McLaughlin* from those cases in which unconstitutional treatment had ended by the time the pleading was filed, explaining "*McLaughlin* . . . concerned a situation where the plaintiffs were exposed to a continuing unconstitutional act—a protracted delay in affording them probable cause hearings—which was *ongoing at the time of the complaint*") (emphasis supplied). Mr. Clemons, however, was arrested by the City of Atlanta, not the Fulton County Police, and his standing to pursue injunctive relief *against the County* is therefore lacking. (*See* Jan. 13, 2005 Order at 31 ("while Fulton County may be liable for the arrestees placed in the Jail by its police department (over which it exerted control), it may *not* be subject to § 1983 liability for arrestees placed in the Jail by" other municipal or state actors) (emphasis in original).)

In sum, Plaintiffs lack standing to pursue injunctive relief against the County Defendants.

Insofar as the County Defendants seek to dismiss such requests for relief, their motion is granted.

II. *Plaintiffs' Request for Reconsideration*

Plaintiffs, in their opposition to Defendants' motions to dismiss, attempt to rely on *Abusaid v. Hillsborough County Board of County Commissioners*, 405 F.3d 1298 (11th Cir. 2005), as "intervening case law" establishing that a so-called Jail Local Constitutional Amendment renders the Fulton County Sheriff an officer of Fulton County in his capacity as administrator of the Jail. (*See* Jan. 13, 2005 Order at 20-23 (discussing, and rejecting, Plaintiffs' argument).) In *Abusaid*, the Eleventh Circuit held a Florida sheriff was acting as a county official in his enforcement of a county ordinance. 405 F.3d at 1304. Plaintiffs argue that, because the Sheriff was "designated" to control the Fulton County Jail pursuant to the amendment, a similar result is compelled here. The Court finds this argument to lack merit.

The "Jail Local Constitutional Amendment," as this Court's prior Order explained, provides as follows:

> The governing authority of Fulton County is hereby authorized to maintain and operate facilities within or without the boundaries of said County for the detention, incarceration or confinement of all persons (including juveniles) subject to detention, incarceration or confinement under the laws of this State, under any County resolution or under any

> City ordinance. Such facilities, whether designated as a jail, public works camp, or detention center, shall be under the control of such persons or official as may be designated by the governing authority of Fulton County, and need not be used exclusively for any one class of prisoner or person.

H.R. 687-1585, 1972 Sess., at 1439 § 1 (Ga. 1972), *continued in effect in* S. 503, 1986 Sess., at 4428 (Ga. 1986); *see also* Fulton County, Ga., Code § 1-122 (codifying same provision as part of Fulton County Code relating to powers of the Board of Commissioners). Plaintiffs argued that this provision of the Georgia Constitution and the Fulton County Code gave the Fulton County Board power over the operation of the County Jail, bringing them within the ambit of municipal liability under § 1983.

The Court declined to accept this argument in its January 13, 2005 Order, observing that it reflected a misconstruction of the cited amendment. Specifically, it pointed out that nothing in the amendment or the Fulton County Code reflected the Board's *exercise* of any power to erect a separate detention facility, or to affirmatively "designate" any person to operate such a facility. It rejected, as a matter of law, Plaintiffs' argument that mere inaction by the Fulton County Board of Commissioners had implicitly resulted in its adoption of the Fulton County Jail as its "own," and that the Board's failure to designate someone other than the Sheriff to operate the facility tacitly resulted in its "designation" of the person holding

that office to so control the institution. The Court struggles to see how *Abusaid* in any way cures this basic legal flaw in Plaintiffs' argument. Their request for reconsideration is denied.

III. *Defendants' Motions to Stay Discovery*

In their motions to stay discovery, Defendants request a stay during the pendency of their motions to dismiss. Those motions now having been resolved, County Defendants' Motion to Stay Discovery [92-1] and Defendants Barrett and Freeman's Motion to Stay Discovery [93-1] are DENIED as moot.

CONCLUSION

Plaintiffs' Consent Motion for an Extension of Time to Respond to Defendants Barrett and Freeman's Motion to Dismiss [89-1], Plaintiffs' Consent Motion for Extension of Time to Respond to City of Atlanta's Motion to Dismiss [95-1], and Plaintiffs' Second Consent Motion for Extension of Time to Respond to County Defendants' Motion to Dismiss [101-1] are GRANTED *nunc pro tunc*. Likewise, Plaintiffs' Motion for Judicial Notice [113-1], being unopposed, is GRANTED. *See* LR 7.1B, NDGa ("Failure to file a response shall indicate that there is no opposition to the motion.").

Defendants Barrett and Freeman's Motion to Dismiss Counts in the Fourth Amended Complaint [85-1], and the County Defendants' Motion to Dismiss Plaintiffs' Fourth Amended Complaint [88-1] are GRANTED in part and DENIED in part. Defendant City of Atlanta's Motion to Dismiss the Fourth Amended Complaint [87-1] is DENIED.

County Defendants' Motion to Stay Discovery [92-1] and Defendants Barrett and Freeman's Motion to Stay Discovery [93-1] are DENIED as moot.

In accordance with its March 25, 2005 Order, the Court continues to RESERVE RULING on County Defendants' Motion for Certification of Order for Interlocutory Appeal [77-1]. The County Defendants will have 30 days from the date appearing on this Order within which to either amend their pending Motion for Certification or to inform the Court that they will not be filing an amendment. Plaintiffs will have 30 days after Defendants file their amended motion or notice within which to file a response to the motion. Defendants' reply brief will be due 15 days after Plaintiffs file their response.

SO ORDERED this 5th day of July, 2005.

/s/ Richard W. Story
RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:04-CV-1100-RWS

ALAN POWELL, et al.,

Plaintiffs,

v.

JACQUELINE BARRETT,

Defendant.

March 3, 2011

ORDER

This case comes before the Court on Defendant Jacqueline Barrett's Motion for Summary Judgment [269], Plaintiffs Alan Powell, et al.'s Rule 56(d) Motion [282] and Defendant Jacqueline Barrett's Motion to Exclude Testimony of Expert Witness [259], and Plaintiffs' Motion for Leave to File a Revised Opposition to Defendant's Statement of Facts [284]. After a review of the record, the Court issues the following Order.

As an initial matter, Plaintiffs did not file any opposition to Defendant's Statement of Material Facts [269-2], therefore their Motion for Leave to File a Revised Opposition [284] is DENIED.

BACKGROUND

Plaintiffs assert claims against Defendant Jacqueline Barrett in her individual capacity for alleged strip searches and over-detentions that occurred at the Fulton County Jail between December 2003 and May 2004, during the period when Defendant was sheriff of the Jail. According to the Fourth Amended Complaint, the Jail had no effective inmate management system which caused inmates to be detained after they had been ordered release. (Fourth Am. Comp., Dkt. [78] at ¶¶ 206, 208). Plaintiffs assert that this policy of over-detention was a violation of their constitutional rights. (*Id.* at ¶ 395).

The named Plaintiffs in this case also claim that they were subjected to illegal strip searches upon entering or re-entering the general population at the Fulton County Jail. (*Id.* at ¶¶ 12, 14). The eleven named plaintiffs can be divided into three groups with regard to their strip search claims. The first group, the Arrestee Strip Search Class (AR), consists of inmates who were strip searched as part of the point-of-entry booking process before they were placed into the general jail population for the first time. (*Id.* at ¶ 180). The second group, the Alpha Strip Search Class (AL), were subjected to the booking process, including the booking strip searches, after posting bond or having been ordered released at their first appearances. (*Id.* at ¶¶ 187, 188). The third group, the Court Return Strip Search Class (CR), includes inmates who were ordered released by a judge in state court and returned to the Jail where

they were subjected to blanket strip searches. (*Id.* at ¶¶ 204, 205).

In an *en banc* decision, the Eleventh Circuit held that the strip searches of the AR class did not violate Plaintiffs' Fourth Amendment rights. *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008). The court then remanded the case back to this court to apply the principles discussed in the opinion to the AL and CR classes. *Powell v. Barrett*, 307 Fed. Appx. 434, 436 (11th Cir. 2009).

DISCUSSION

I. *Defendant's Motion for Summary Judgment [269] and Plaintiffs' Rule 56(d) Motion [282]*

A. Background

Defendant filed a Motion for Summary Judgment as to Qualified Immunity [269]. In response, Plaintiffs have made a Rule 56(d) Motion alleging that they are unable to present facts essential to justify their opposition to Defendant's Motion for Summary Judgment. (Plaintiffs' Rule 56(d) Motion to Deny Defendant's Motion for Summary Judgment, Dkt. [282] at p. 2). Plaintiffs filed their Rule 56(d) Motion on December 8, 2010 styled as a Rule 56(f) Motion. Under the amendment to the Federal Rules of Civil Procedure, which became effective on December 1, 2010, the grounds Plaintiffs assert for opposing Defendant's Summary Judgment Motion are now contained in Rule 56(d), not Rule 56(f). Therefore, this Court will consider the Plaintiffs' Motion as a Rule 56(d) Motion.

B. Rule 56(d) Standard

District Courts have the discretion to postpone ruling on a party's motion for summary judgment if the nonmovant needs additional discovery to explore "facts essential to justify its opposition." FED. R. CIV. P. 56(d). Rule 56(d) provides that a court may allow time for additional discovery "if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to the moving party's motion for summary judgment. *Id.*

Plaintiffs assert that they are unable to respond to Defendant's Motion for Summary Judgment. In his affidavit, William Claiborne, Plaintiffs' counsel, contends that Plaintiffs "cannot justify their opposition to defendant's summary judgment motion . . . because plaintiffs have not had discovery on the claims from defendant and the summary judgment motion exceeds the scope of the Court of Appeals remand motion." (Aff. of William Claiborne, Dkt. [282-2] at p. 2).

In its July 14, 2009 Order, the Court ruled that "discovery should be narrowly limited until the threshold constitutional issues can be decided." (Dkt. [199] at 2). As a result, discovery was restricted to information regarding only the length of the named plaintiffs' detentions and the circumstances of each plaintiff's release from the Fulton County Jail. (*Id.* at pp. 2, 4). Plaintiffs contend that in order to properly respond to Defendant's Motion for Summary Judgment on the issue of qualified immunity,

information regarding the releases of a broader class of inmates is necessary.

C. Standard for Qualified Immunity

Under the doctrine of qualified immunity, government officials performing discretionary functions may not be held individually liable for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama*, 28 F.3d 1146, 1149 (11th Cir.1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)) The court may ascertain whether this standard has been met by making two determinations: (1) whether the defendant committed a violation of the plaintiff's constitutional rights, and (2) whether the violation was governed by clearly established law. *See West v. Tillman*, 496 F.3d 1321, 1327 (11th Cir. 2007) (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L.Ed.2d 272 (2001))[1]. In addition, where the plaintiff seeks to hold the defendant liable for acts not taken by the defendant personally but by staff under the defendant's supervision, the plaintiff must show that the defendant acted with deliberate indifference to the plaintiff's constitutional rights. *Id.*

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[1] After the decision in *West v. Tillman*, the Supreme Court held that while the two-step sequence for resolving government officials' qualified immunity claims established in *Saucier* is appropriate, it should no longer be regarded as mandatory in all cases. *See Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 818, 172 L.Ed.2d 565 (2009).

D. Over-Detention Claims

The Eleventh Circuit in *West v. Tillman* explained that the deliberate indifference standard is "a difficult burden for the plaintiff to meet." *Id.* In order to prove deliberate indifference, plaintiffs in over-detention cases must establish a history of widespread abuse sufficient to put the supervisor on notice of the need to correct the alleged deprivation. *Id.* at 1328-29.

Although the Court initially limited discovery to information regarding only the named plaintiffs' over-detentions, under the requirements of *West*, Plaintiffs do not have sufficient information to respond to the deliberate indifference prong of Defendant's argument for qualified immunity. Additional discovery is necessary to enable Plaintiffs to demonstrate "a history of widespread abuse" that was sufficient to put Sheriff Barrett on notice of the problem with over-detentions at the Fulton County Jail and the need to correct that problem.

Defendant objects to the Rule 56(d) motion on the grounds that Plaintiffs failed to explain how additional discovery would preclude the entry of summary judgment. (Def.'s Response in Opposition to Plaintiff's Rule 56(d) Motion, Dkt. [285] at pp. 12-15). However, Plaintiffs have explained that additional discovery will enable them to demonstrate a history of widespread abuse at the Fulton County Jail. (Aff. of William Claiborne, Dkt. [282-2] at pp. 6-7). This showing is necessary for Plaintiffs to rebut Defendant's qualified immunity defense and therefore necessary to respond to Defendant's Motion

for Summary Judgment. *Id.* Defendant also contends that Plaintiffs failed to make use of the available discovery because they only served three interrogatories. (Def.'s Response in Opposition to Plaintiff's Rule 56(d) Motion, Dkt. [285] at pp. 15-16). However, based on the limited discovery allowed by the Court, Plaintiffs did not have access to the information necessary to rebut the defense of qualified immunity.

The Court will allow Plaintiffs additional discovery on any computerized inmate population accounting system used to track inmates in the Fulton County Jail and a manual examination of a statistically valid sample of institutional folders to obtain information on the extent of the over-detention problem during the relevant period. Defendants will have seven days from the date of this Order to file any objections to this expanded scope of discovery. Plaintiffs will then have seven days from the date of Defendant's objections to reply. After considering the objections and the reply and determining the proper scope of additional discovery, the Court will seek a proposed Scheduling Order from the parties pertaining to any additional discovery. Plaintiffs' Rule 56(d) Motion is GRANTED.

Given that the Court granted the Rule 56(d) Motion, Defendant's Motion for Summary Judgment as to Qualified Immunity [269] as to the over-detention class is DENIED WITHOUT PREJUDICE, and with the right to re-file after the completion of the additional discovery.

D. Alpha Class

The AL class is comprised of inmates held in the intake area prior to their first appearances in the Fulton County Jail, ordered released or granted bond at the first appearance, and then placed into the general population and subjected to group, blanket strip searches prior to actual release. (Pl.'s Memo, Dkt. [282-1] at pp. 23-24). The AL class was placed in the general jail population while staff in the Records Room, as part of the release process, searched for other detention orders, warrants, and holds. *Powell v. Barrett*, 496 F.3d 1288, 1313 (11th Cir. 2007), *rev'd en banc*, 541 F.3d 1298 (2008). Because the AL class was subjected to strip searches prior to entering the general population, the inmates' Fourth Amendment rights were not violated under the standard established in the Eleventh Circuit's *en banc* decision in this case. *Powell*, 541 F.3d at 1302 (holding that strip searches of all arrestees as part of the booking process prior to entering the general population, even without reasonable suspicion, is constitutionally permissible). Therefore Sheriff Barrett is entitled to qualified immunity as to the strip search claims of the Alpha Class.

The Eleventh Circuit in this case held that the Fulton County Jail's policy of strip searching inmates entering the general population was justifiable and did not violate the inmates' constitutional rights. *Powell*, 541 F.3d at 1302. The court stated that the reasonableness of a search "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."

Id. at 1305 (quoting *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S. Ct. 1861, 1884, 60 L. Ed. 2d 447 (1979)). In balancing those interests, courts must consider four factors: (1) the scope of the particular intrusion; (2) the manner in which it was conducted; (3) the justification for initiating it; and (4) the place in which it is conducted. *Id.*

The Eleventh Circuit, in considering the *Bell* factors, noted that "the combined weight of the third and fourth factors" supported the finding that the strip search policy as applied to the AR class did not violate the Fourth Amendment. *Id.* at 1306. The Eleventh Circuit held that these two factors merged into one "heavy consideration because the searches took place in a detention facility and the justification for them was the critically important security needs of the facility." *Id.* According to the Court, "a detention facility is a unique place fraught with serious security concerns." *Id.* (quoting *Bell*, 441 U.S. at 559). "Employees . . . and . . . the detained inmates themselves face a real threat of violence, and administrators must be concerned on a daily basis with the smuggling of contraband by inmates accused of misdemeanors as well as those accused of felonies." *Id.* at 1310. The Eleventh Circuit concluded that these safety concerns justified the strip searches of the AR class before entering the general population of the Fulton County Jail. *Id.* at 1302.

These same safety concerns support the finding that the strip searches of the AL class did not violate the Fourth Amendment. The late booking process was the first time the AL class was subject to strip

searches because the class was not strip searched prior to attending their first appearances. As such, the AL class, like the AR class, was strip searched prior to entering the general population after having contact with individuals outside of the Fulton County Jail.

The Jail has significant and legitimate security interests supporting the requirement that all inmates entering and re-entering the general population be strip searched. The searches of the AL class occurred after the inmates had been outside the jail and presented an increased security hazard. Therefore, a search of the body was necessary to ensure that no contraband was introduced into the general population.

Plaintiffs assert that if the AL class presented a security risk, the Fulton County Jail should have released them instead of placing them into the general population. (Pl.'s Memo, Dkt. [282-1] at p. 29). While Plaintiffs' claim that the AL class had a constitutional right to be released instead of placed into the general population has merit, this contention goes to the over-detention claims and has no bearing on the constitutional validity of strip searching the AL class. Under the reasoning of *Powell*, the Fulton County Jail has strong security interests justifying searches of inmates prior to entering the general population. In the case of the AL class, the strip searches were performed before the inmates entered the jail population and after they had contact with individuals outside of the jail facility. As a result, the Jail's policy did not violate a clearly established

constitutional right of the AL class. Defendant's Motion for Summary Judgment as to Qualified Immunity [269] as to the AL Class is GRANTED.

Unlike the over-detention class, Plaintiffs do not need additional information to respond to Defendant's claim of qualified immunity. The Eleventh Circuit's decision in this case demonstrates that the strip searches of the AL class did not violate any clearly established constitutional rights. There is no need for additional discovery as to this claim. As a result, Plaintiff's Rule 56(d) Motion [282] is DENIED as to the AL class.

E. Court Return Class

The CR class is comprised of in-custody defendants who went to court for court hearings, became entitled to release at the hearings, and were subjected to blanket strip searches upon their return to the Fulton County Jail. (Pl.'s Memo, Dkt. [282-1] at p. 31). The CR class was under constant supervision while in transit to and from the Jail and while at the courthouse. (Fourth Am. Comp., Dkt. [78] at ¶ 193). Unlike the AL class, the CR class had already been subjected to strip searches upon their initial entry into the Fulton County Jail. After returning from court, they were subjected to another strip search before being placed back into the general population.

The same security concerns that justified the searches of the AR and the AL classes support the strip searches of the CR class. The inmates were subjected to the searches after having contact with

individuals outside the Jail population. There was a risk that the CR class could acquire contraband during their transfers between the Jail and the courthouse, and introduce it into the general population. As a result, the strip searches before re-entering the general population are justified under the Eleventh Circuit's *en banc* decision. *Powell*, 541 F.3d at 1302.

The Jail's security interests were not eliminated simply because the CR class was under constant supervision during the transfers to and from the courthouse. In *Bell*, the Supreme Court upheld the searches of inmates reentering the general population after having contact visits with individuals from outside the facility, even defense attorneys. *Bell*, 441 U.S. at 560. These contact visits occurred in glass-enclosed rooms and were continuously monitored by corrections officers. *Id.* at 577 (Marshall, J., dissenting). Despite the constant monitoring of the inmates, the Supreme Court held that the security risks associated with the smuggling of contraband justified searching the inmates after these visits. *Id.* at 559. The CR class, like the plaintiffs in *Bell*, were subject to constant monitoring during their time outside of the jail. Despite this monitoring, the same risk of acquiring contraband that supported the search in *Bell* exists in this case.

Plaintiffs assert that "every court that has addressed strip searching court returns after a judge has ordered them released has condemned the practice, and ruled returning court returns to a county jail to process them out or to check for

detainers is an administrative interest that does not justify strip searching them." (Pl.'s Memo, Dkt. [282-1] at p. 36). Therefore, according to Plaintiffs, the strip searches are not justified under the four factors identified by *Bell* because they serve the administrative convenience interests of the Sheriff, and not the legitimate security interests of the Fulton County Jail. *Id.* While Plaintiffs' claim that the CR class had a constitutional right to be kept out of the general population after posting bond or having charges dismissed may have merit, it does not impact the constitutionality of the strip searches. Moreover, despite Plaintiffs' contention, the strip searches were not searches to process inmates out of the Jail. *Id.* Instead, they were searches conducted before the CR class reentered the general population. The Eleventh Circuit acknowledged the numerous security risks posed by inmates re-entering the general population. *Powell*, 514 F.3d at 1310-12. As a result, the strip searches served more than "administrative interests," and instead served the security interests of the Jail. Because the policy of strip searching the CR class did not violate a clearly established constitutional right, Sheriff Barrett is entitled to qualified immunity. Therefore, Defendant's Motion for Summary Judgment as to Qualified Immunity [269] as to the CR Class is GRANTED.

Moreover, Plaintiffs' do not need additional discovery to rebut Defendant's Motion for Summary Judgment as to the CR class. Thus, Plaintiff's Rule 56(d) Motion [282] is DENIED as to the CR class.

II. *Motion to Exclude Testimony [259]*

Defendant seeks to preclude Plaintiffs from offering any and all opinion testimony of Plaintiffs' expert witness, David Goldstein, relating to the interpretation of inmate records on the grounds that Plaintiffs failed to satisfy the requirements of Local Rule 26.2 (c) and Fed. R. Civ. P. 26(a)(2)(B). (Def.'s Br., Dkt. [259-1] at pp. 1,5,6).

Despite Plaintiffs' contention that Mr. Goldstein is a fact witness, the Court concludes that the testimony of Mr. Goldstein proffered by Plaintiffs is appropriately considered expert testimony under Fed. R. Evid. 702. Because Mr. Goldstein will offer expert testimony, Plaintiffs are subject to the disclosure requirements of Local Rule 26.2(c) and Fed. R. Civ. P. 26.

A witness with specialized knowledge can testify as a fact witness if the testimony is "rationally based on the witnesses own perceptions." *United States v. Rivera*, 22 F.3d 430, 434 (2d. Cir. 1994)(quoting FED. R. EVID. 701(a)). Witnesses with specialized knowledge and training may be pure fact witnesses when they directly participate in the events at issue in a particular case. *Morgan v. U.S. Xpress, Inc.*, 2006 WL 278398, at *2 (M.D. Ga. Feb. 3, 2006) (citing *Gomez v. Rivera Rodriguez*, 344 F.3d 103,113 (1st Cir. 2003)). Moreover, owners and employees of a particular business may testify as fact witnesses because of their particularized knowledge gained by virtue of their position in the business. *See Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, 320 F.3d 1213, 1222 (11th Cir. 2003). On the

other hand, if the testimony consists of "opinions based on scientific, technical, or other specialized knowledge," the witness is not a fact witness, but instead an expert witness under Fed. R. Evid. 702. *Morgan*, 2006 WL 278398, at *3 (quoting FED. R. EVID. 702).

Mr. Goldstein's testimony will be expert testimony as opposed to lay opinion testimony. Mr. Goldstein has no affiliation with the Fulton County Sheriff's Office. Moreover, he has never worked in the Fulton County Jail, was not a sheriff's deputy or employee, and did not represent any of the Plaintiffs in connection with the charges leading to the subject incarcerations. As a result, Mr. Goldstein's testimony is not based on his own perceptions of the events at the Fulton County Jail nor is his testimony based on specialized knowledge acquired by virtue of his position at the Jail. Instead, Mr. Goldstein's interpretation of inmate records is appropriately considered expert testimony under Fed. R. Evid. 702 because it is based on the specialized general knowledge he acquired working as a public defender.

Because the Court finds that Mr. Goldstein is an expert, Plaintiffs failed to make the appropriate disclosures required by Local Rule 26.2 and Fed. R. Civ. P. 26. Under Local Rule 26.2, a party "who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert." Local Rule 26.2(c), N.D. Ga. Plaintiffs failed to disclose Mr. Goldstein as an expert during the discovery period. The discovery

period for the current post-remand phase of the litigation expired on December 18, 2009, and the deadline for supplemental discovery was June 14, 2010. Plaintiffs did not advise Defendant that they had retained an expert until August 2, 2010, well after the close of the supplemental discovery period. Additionally, under Fed. R. Civ. P. 26(a)(2)(B), the disclosure of an expert witness must be accompanied by an expert report. Here, Plaintiffs failed to include an expert report when they disclosed Mr. Goldstein on August 2, 2010.

Although the Court finds that Mr. Goldstein is an expert and that Plaintiffs failed to make the required disclosures, the Court will not exclude his testimony at this juncture. Instead, given the extension of the discovery period to enable Plaintiffs to gather evidence of deliberate indifference, the Court will allow Plaintiffs the opportunity to make the required disclosures under Local Rules 26.2 and Fed. R. Civ. P. 26(a)(2)(B). The expert report should be served upon Defendant within seven days from the date of this Order. Plaintiffs should make Mr. Goldstein available to Defendant for deposition. Defendant will have fourteen days from the filing of the expert report to depose Mr. Goldstein and seven days from the date of the deposition to offer any counter-experts. Plaintiffs will then have fourteen days from that time to depose the Defendant's counter-experts. The parties will then have an opportunity to file any motions to exclude the testimony of either expert in accordance with the

Local Rules of this Court. Accordingly, Defendant's Motion to Exclude Testimony [259] is DENIED.

CONCLUSION

For the aforementioned reasons, Defendant's Motion for Summary Judgment [269] is GRANTED as to the AL and CR Classes, and DENIED without prejudice as to the Over-Detention Class. Plaintiffs' Rule 56(d) Motion [282] is GRANTED as to the Over-Detention Class, and DENIED as to the AL and CR Classes. Defendant's Motion to Exclude Testimony [259] is DENIED, and Plaintiffs' Motion for Leave to File a Revised Opposition [284] is DENIED.

SO ORDERED this 3rd day of March, 2011.

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RICHARD W. STORY
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:04-CV-1100-RWS

C. ALAN POWELL, et al.,

Plaintiffs,

v.

JACQUELINE BARRETT,

Defendant.

February 17, 2012

ORDER

This case comes before the Court on Defendant's Motion for Summary Judgment [269], Plaintiffs' Motion to Motion to [*sic*] Exclude Purported Expert Opinion Evidence of Mr. Lane [314], and Defendant's Motion for Oral Argument [316]. After reviewing the Record, the Court enters the following Order.

As a preliminary matter, the Court finds that oral argument will not aid the Court in resolving Defendant's Motion for Summary Judgment. Accordingly, the Court hereby DENIES Defendant's Motion for Oral Argument [316].

BACKGROUND

Plaintiffs, certain former detainees at the Fulton County Jail (the "Jail"), initiated this putative class

action on April 21, 2004, raising claims against Defendant Jacqueline Barrett in her individual capacity arising out of alleged strip searches and over-detentions to which Plaintiffs were subjected between December of 2003 and May of 2004, during which time Defendant was Sheriff of the Jail. With respect to the strip search claims, the named Plaintiffs could be classified into three separate groups: first, the Arrestee Strip Search Class ("AR Class"), which consisted of inmates who were strip searched as part of the point-of-entry booking process before being placed, for the first time, into the general Jail population; second the Alpha Strip Search Class ("AL Class"), which consisted of inmates who were granted bond or ordered to be released at their first appearances, but subjected to another strip search and placed back into the general population prior to actual release; and, finally, the Court Return Class ("CR Class"), which consisted of inmates who went to court for hearings and were ordered to be released, but who were subjected to another strip search and placed back into the general population prior to being released. (Order, Dkt. No. [290] at 2, 9, 13.)

In an *en banc* decision, the Eleventh Circuit Court of Appeals held that the strip searches of the AR Class did not violate those Plaintiffs' constitutional rights. *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008). The court then remanded the case back to this Court to apply the principles discussed in the opinion to the claims of the AL and CR classes. *Powell v. Barrett*, 307 F.

App'x 434, 436 (11th Cir. 2009). On remand, the Court held, by Order dated March 3, 2011, that under the principles articulated by the Eleventh Circuit, the strip searches of the AL and CR classes did not violate those Plaintiffs' constitutional rights; accordingly, the Court granted Defendant's Motion for Summary Judgment [269] on grounds of qualified immunity as to the remaining strip search claims. (Order, Dkt. No. [290] at 13, 16.)

In the same Order, however, the Court denied without prejudice Defendant's Motion for Summary Judgment [269] on grounds of qualified immunity as to Plaintiffs' over-detention claims, granting instead Plaintiffs' Rule 56(d) Motion [282] for further discovery. (*Id.* at 8-9.) Specifically, the Court granted Plaintiffs' request for additional discovery to demonstrate a "history of widespread abuse" of inmates' constitutional rights at the Jail (i.e., a history of over-detentions), which the Court found was necessary to enable Plaintiffs to rebut the defense of qualified immunity. (*Id.* at 7-8.)

By Order dated August 8, 2011, however, the Court vacated its March 3, 2011 Order [290] to the extent it granted Plaintiffs' Rule 56(d) Motion. (Dkt. No. [300] at 6.) The Court found that contrary to the findings of its initial Order, additional discovery was not needed to demonstrate a problem with over-detentions at the Jail given that Defendant admitted that such a problem existed. (*Id.* at 2-3.) In light of this admission, Defendant argued that her qualified immunity defense would revolve around the issue of whether she was deliberately indifferent to the

problem. (*Id.* at 5-6.) Finding that Plaintiffs had had a sufficient opportunity to discover information related to this issue, the Court reconsidered and denied Plaintiffs' Rule 56(d) Motion for further discovery. (*Id.*)

In light of this ruling, the Court ordered Plaintiffs to respond to Defendant's Motion for Summary Judgment [269] on the over-detention claims–the only claims that currently remain in this case. (*Id.* at 6.) This motion has now been fully briefed and is ripe for decision.

DISCUSSION

I. *Defendant's Motion for Summary Judgment [269]*

A. Legal Standard

Federal Rule of Civil Procedure 56 requires that summary judgment be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "The moving party bears 'the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259 (11th Cir. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotations omitted)). Where the moving party makes such a showing, the burden shifts to the non-movant,

who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

The applicable substantive law identifies which facts are material. *Id.* at 248. A fact is not material if a dispute over that fact will not affect the outcome of the suit under the governing law. *Id.* An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 249-50.

In resolving a motion for summary judgment, the court must view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1296 (11th Cir. 2002). But, the court is bound only to draw those inferences which are reasonable. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted); *see also Matsushita*, 475 U.S. at 586 (once the moving party has met its burden under Rule 56(a), the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts").

B. Qualified Immunity

As stated above, Defendant moves for summary judgment on Plaintiffs' over-detention claims on grounds of qualified immunity. The doctrine of qualified immunity protects government officials performing discretionary functions from being sued in their individual capacities. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Officials are shielded "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis thus is governed by a two-step framework. One inquiry in the analysis is "whether the plaintiff's allegations, if true, establish a constitutional violation." *Barnett v. City of Florence*, 409 F. App'x 266, 270 (11th Cir. 2010) (citing *Hope v. Pelzer*, 536 U.S. 730, 736 (2002)). "If the facts, construed . . . in the light most favorable to the plaintiff, show that a constitutional right has been violated, another inquiry is whether the right violated was 'clearly established.'" *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "Both elements of this test must be present for an official to lose qualified immunity, and this two-pronged analysis may be done in whatever order is deemed most appropriate for the case." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 241 (2009)). Finally, the qualified immunity analysis "is a pure question of law" at the summary judgment stage once the court has "drawn all inferences in favor of the nonmoving

party to the extent supportable by the record." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007).

The Court first undertakes the inquiry of whether Plaintiffs have shown a constitutional violation on the part of Defendant. If the Court finds a sufficient showing of a constitutional violation, it then must consider whether the violation was of a clearly established right. If, however, no violation has been established, the inquiry ends and the Court must find Defendant entitled to qualified immunity. Under the Fourteenth Amendment Due Process Clause, a detainee has a "constitutional right to be free from continued detention after it was or should have been known that [he] was entitled to release." *Cannon v. Macon Cnty.*, 1 F.3d 1558, 1563 (11th Cir. 1993). To establish a violation of this right, "Plaintiffs must show that Defendant[ ] acted with deliberate indifference to Plaintiffs' due process rights." *West v. Tillman*, 496 F.3d 1321, 1327 (11th Cir. 2007).

In this case, Plaintiffs seek to hold Defendant liable in her supervisory capacity for the alleged over-detentions that occurred at the Jail. In this regard, "'[i]t is well established in this Circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability.'" *Id.* at 1328 (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003)). On the contrary, "supervisory liability occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the

actions of a supervising official and the alleged constitutional violation." *Cottone*, 326 F.3d at 1360. The requisite causal connection can be established by showing, among other things, "a history of widespread abuse [which] puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so." *Id.* The Eleventh Circuit Court of Appeals has held that the standard for supervisory liability is "extremely rigorous." *Id.* at 1360.

Plaintiffs seek to establish deliberate indifference on the part of Defendant to Plaintiffs' constitutional rights by showing that Defendant was on notice of the over-detentions and yet failed to take action to stop them. Specifically, Plaintiffs allege that Defendant "engaged in a pattern of continued inaction in the face of employees' documented widespread abuse of [Plaintiffs' constitutional rights] by failing to ensure their release on their Release Dates." (Am. Compl., Dkt. No. [78] ¶ 517.) In support of her Motion for Summary Judgment, Defendant does not deny the problem of over-detentions; on the contrary, she admits that such a problem existed but argues that she "vigorously addressed [it] with a wide variety of actions" and thus was "anything but deliberately indifferent" to it. (Def.'s Mot. for Summ. J., Dkt. No [269] at 19-20.)

The parties agree that one of the causes of the over-detentions was a shortage of Jail staff during the relevant time period combined with a sharp increase in the average daily population at the Jail. (Def.'s Statement of Undisputed Material Facts

("Def.'s SOF"), Dkt. No. [269-2] ¶ 37.) In 2003, the City of Atlanta decided to send all Atlanta Police Department arrestees charged with state offenses to the Jail rather than city detention facilities, which resulted in a twenty-nine percent increase in the average daily Jail population. (*Id.* ¶¶ 32-33.) Approximately fifty to sixty new inmates were received at the Jail each day, with even higher numbers on Friday and Saturday. (*Id.* ¶ 35.) Despite this influx of inmates, the number of Jail staff did not increase, causing the Jail to experience significant staff shortages. (*Id.* ¶¶ 34. 36.)

In addition to staff shortages and an increasing Jail population, Defendant cites other reasons for the over-detentions. Defendant contends that unavoidable delays in obtaining paperwork from the courts further delayed the release of inmates, as did the fact that court documents were not in a standard format and were often difficult for Jail staff to read and understand. (*Id.* ¶¶ 38, 41-44.) Finally, Defendant contends that Jail staff had to consult different computer systems for the sheriff, courts, and district attorney before an inmate could be cleared for release, which further contributed to the delays. (*Id.* ¶ 39.) While Plaintiffs generally "deny" that these additional factors contributed to delay, they put forward no evidence to refute them. (Pls.' Combined Opp. to Def.'s SOF and Pls.' Statement of Facts ("Pls.' SOF"), Dkt. No. [307-1] ¶¶ 38, 39, 41-44.)

In support of her argument that she was not deliberately indifferent to the problem of over-detentions, Defendant alleges that she took the

following actions: "(1) request[ed] funding for additional staff; (2) [took] steps to increase the efficiency of existing staff; (3) work[ed] to improve the transfer of information from the courts to the Jail, so that releases could be processed more efficiently; and (4) hir[ed] a new Chief Jailor to study and improve Jail processes, particularly including the release process." (Def.'s Mot. for Summ. J., Dkt. No. [269-1] at 20.) With specific regard to staff shortages and staff efficiency, Defendant did the following: First, she attempted to reduce staff shortages by suggesting to the County that certain Jail staff positions be made civilian rather than sworn, so that Defendant could hire more employees for less money. (Barrett Dep., Dkt. No. [269-6] at 99-100.) Additionally, Defendant reassigned staff from other parts of the Jail or from outside the building to help with the book-out process. (*See id.* at 99, lines 11-19 ("[During] peak periods I reassigned staff from inside of the building or even outside the building to come in and to help with the book-out process. There was a point at which I required all of the senior staff, I don't care what bureau they worked in, courts, warrant, all of us worked at the jail for at least a shift so that we could give some relief to others inside the building so that we could redirect staff perhaps down to the book-out process.").) At one point, Defendant also required Jail staff to log on a board the names of inmates who were waiting to be released with the goal of clearing those names off the board. (*Id.* at 100, lines 9-13.)

Defendant also obtained a new filing system for the Jail records room in an effort to speed up the book-out process. (*Id.* at 111-12, lines 25-3.) (The Court notes, however, that this "new filing system" appears to refer only to filing cabinets, which Defendant provided to take the place of milk crates.) With regard to communicating with the courts, Defendant met with the Chief Judge of the Superior Court and members of the District Attorney's office to make sure that the Jail received records from the courts as expeditiously as possible. (*Id.* at 104, lines 15-18.) She also sent a memo to the Fulton County judges asking them to send orders regarding case dispositions to one central fax number. (*Id.* at 134, lines 19-25.) In addition, when the funds were available to pay employees overtime, Defendant authorized a staff member to be a liaison with the Court to ensure that Court documents issued late in the day were sent to the Jail. (*Id.* at 139-140, lines 13-5.)

Finally, in September of 2003, Defendant hired Roland Lane, Jr. to serve as Chief Jailor. (Decl. of Roland Lane, Dkt. No. [269-7] ¶ 2.) Defendant tasked him with improving jail processes in Fulton County, generally, and charged him with "making the intake and release processes more efficient and effective using available staff." (*Id.* ¶ 6.) Lane made it a priority as Chief Jailor to speed up the release process through an initiative he termed "Operation Bum's Rush." (*Id.* ¶ 7.)

To refute a claim of deliberate indifference, a supervisory official must show that she "did not fail

to act correctively to address the problem." *West*, 496 F.3d at 1330. Thus, the Eleventh Circuit has held that a sheriff was not deliberately indifferent to the problem of under-staffing at the jail, which led to significant over-detentions, where the sheriff took the following actions: "asked existing staff to work overtime," "temporarily brought in employees from other departments," and "hired new employees . . . ." *Id.* In this case, Plaintiffs argue that the aforementioned measures Defendant took were insufficient to address the problem of over-detentions and at times led to perverse results (i.e., longer delays). (*See generally* Pls.' Opp'n, Dkt. No. [307].) However, the question the Court must answer is not whether Defendant approached the problem in the best way or achieved the best results, but whether she was "deliberately indifferent"—that is, whether she failed to take corrective action. As stated above, this is an "extremely rigorous" standard to meet. "Human error does not equal deliberate indifference." *West*, 496 F.3d at 1327. Deliberate indifference clearly contemplate culpable conduct greater than negligence. *Id.* In spite of the evidence of negligence on the part of Defendant, under the rationale of *West*, the Court cannot conclude, based on the conduct set forth above, that Defendant acted with deliberate indifference to the problem of over-detentions at the Jail. Accordingly, the Court finds that Plaintiffs have failed to satisfy the standard for supervisory liability.

Having found no constitutional violation on the part of Defendant, the Court need not undertake the second prong of the qualified immunity analysis.

(*See, e.g., Cottone*, 326 F.3d at 1362 ("Because [Plaintiffs have not established] a constitutional violation committed by the supervisory defendant[], we need not reach the 'clearly established law' prong of the qualified immunity inquiry with respect to supervisory liability. . . .).) The Court concludes that Defendant is entitled to qualified immunity on Plaintiffs' over-detention claims and hereby GRANTS Defendant's Motion for Summary Judgment [269].

II. *Plaintiffs' Motion to Exclude [314]*

In light of the Court's ruling in Part I, *supra*, granting Defendant's Motion for Summary Judgment [269] as to the only claims remaining in this action, Plaintiff's Motion to Exclude Purported Expert Opinion of Mr. Lane [314] is hereby DENIED as moot.[1]

CONCLUSION

In accordance with the foregoing, the Court hereby GRANTS Defendant's Motion for Summary Judgment [269] as to Plaintiff's over-detention claims, DENIES as moot Plaintiff's Motion to Exclude Purported Expert Opinion of Mr. Lane [314], and DENIES Defendant's Motion for Oral Argument [316]. As no claims remain, the Court DIRECTS the Clerk to enter final judgment in favor of Defendant.

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[1] The Court notes that in reaching its decision to grant Defendant's Motion for Summary Judgment, it did not rely on the statements made in the Lane Declaration or Deposition that Plaintiffs challenge in this Motion.

SO ORDERED, this 17th day of February, 2012.

RICHARD W. STORY
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:04-CV-1100-RWS

C. ALAN POWELL, TORY DUNLAP, LEE ANTONIO SMITH, DAVID EVANS, STANLEY CLEMONS, II, ALLEN MIDDLETON, ANTHONY WESTBROOK, BENJAMIN BLAKE, HARRY WITHERSPOON, ANTIONNE WOLF, KRISTOPHER ALAN MATKIN, Individually, and on behalf of all others,

Plaintiffs,

v.

JACQUELINE BARRETT, Former Sheriff, Fulton County, State of George, Individually; MYRON FREEMAN, Sheriff, Fulton County, State of Georgia, Individually and in his Official Capacity; FULTON COUNTY, State of Georgia; KAREN HANDEL, Chairperson, Fulton County Board of Commissioners; ROBB PITTS, Member, Fulton County Board of Commissioners; TOM LOWE, Member, Fulton County Board of Commissioners; EMMA I. DARNELL, Member, Fulton County Board of Commissioners; NANCY BOXILL, Member, Fulton County Board of Commissioners; WILLIAM "BILL" EDWARDS, Member, Fulton County Board of Commissioners; CITY OF ATLANTA, State of Georgia,

Defendants.

* * *

February 25, 2005

EXCERPTS FROM FOURTH AMENDED COMPLAINT FOR MONEY DAMAGES, INJUNCTIVE RELIEF, PRELIMINARY INJUNCTION, AND JURY DEMAND CLASS ACTION

INTRODUCTION

1. This is an action brought by C. Alan Powell, David Evans, Stanley Clemons, Allan Middleton, Anthony Westbrook, Benjamin Blake, Harry Witherspoon, and Antionne Wolf (the "Arrestee Strip Search Named Plaintiffs") on their own behalf individually, and on behalf of a class of individuals ("Arrestee Strip Search") who were injured by Defendants' conduct in causing them to be subjected to blanket strip searches upon their arrest and commitment to the Fulton County Jail. The term "blanket strip search" is more fully discussed later.

2. This is also an action brought by C. Alan Powell and Kristopher Alan Matkin (the "Alpha-Strip Search Named Plaintiffs") on their own behalf individually, and on behalf of a class of individuals ("Alpha Strip Search Class") who were injured by Defendants' conduct in causing them to be subjected to blanket booking strip searches upon their arrest and commitment to the Fulton County Jail. The term "blanket strip search" is more fully discussed later.

3. This is also an action brought by David Evans, Benjamin Blake, and Antionne Wolf (the "Court

Return Strip Search Named Plaintiffs") on their own behalf and on behalf of a class of individuals ("Court Return Strip Search Class") who were injured by Defendants' conduct in subjecting them (or causing them to be subjected to) to blanket strip searches (described below) after they were returned from Superior Court or State Court to the Fulton County Jail after a judge ordered their release, and after there was no longer a basis for their detention. They were further injured by Jacqueline Barrett's and the other defendants' deliberate indifference to the practice of strip searches; her failure to train, supervise and/or discipline her staff, and by her failure to promulgate and enforce policies.

* * *

5. "Blanket strip search" means a strip search conducted without any determination of whether a basis to conduct the search exists.

* * *

8. "Release Date" for each inmate is the day on which the person is entitled to be released by court order, or the date on which the basis for his or her detention has otherwise expired, for example by posting bond, or by being detained pretrial on a charge without judgment past the maximum period of any sentence on that charge.

9. "Exit Date" for each inmate means the date on which he or she was actually released from the custody of the Fulton County Jail.

10. Court return as used herein means an in custody defendant taken from the Fulton County Jail

to one of the courthouses for a hearing, and returned to the Fulton County Jail.

11. The Arrestee Strip Search Named Plaintiffs bring this action against Defendants under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 to enforce their rights under the Fourth and Fourteenth Amendments for injuries suffered by them and other members of the class at the Fulton County Jail. The Arrestee Strip Search Named Plaintiffs also base their claims against Defendant Jacklyn Barrett and Myron Freeman on the Constitution of the State of Georgia and the common law of the State of Georgia.

12. The Alpha Strip Search Named Plaintiffs bring this action against Defendants under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, to enforce their rights under the Fourth and Fourteenth Amendments for injuries suffered by them and other members of the class at the Fulton County Jail. The Alpha Strip Search Named Plaintiffs also base their claims against Defendant Jacklyn Barrett and Myron Freeman on the Constitution of the State of Georgia and the common law of the State of Georgia.

* * *

14. The Court Return Strip Search Named Plaintiffs brings this action against Defendant Jacqueline Barrett under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, to enforce their Fourth and Fourteenth Amendments, for injuries suffered by them and the class. The Court Return Strip Search Named Plaintiffs also bases their claims

against Defendant Jacklyn Barrett and Myron Freeman on the Constitution of the State of Georgia and the common law of the State of Georgia.

JURISDICTION AND VENUE

15. This Court has jurisdiction over the plaintiffs' federal claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). This Court has supplemental jurisdiction over their state law claims against Defendant Jaquelyn Barrett under 28 U.S.C. § 1367.

16. Venue is appropriate in this District and this division. Each of the claims for relief arose in this judicial district, and in this division.

PARTIES-PLAINTIFFS

* * *

35. Plaintiff David Evans is an adult who was overdetained in the Fulton County Jail and subjected to illegal strip searches.

36. Plaintiff David Evans was arrested by the East Point Police on 8/9/03 on a charge of disorderly.

37. On 8/21/03 Plaintiff David Evans was transferred to the Fulton County Jail on a warrant for possession of a weapon.

38. A judge of the Superior Court ordered Plaintiff David Evans released on 8/21/03.

39. Instead of being released from the courthouse, Plaintiff David Evans was taken back to the Fulton County Jail and subjected to an illegal strip search even though a judge had ordered his release, and

there were no other charges, detainers, warrants or holds or other basis to detain him.

40. Plaintiff David Evans' Release Date was 12/1/03.

41. Plaintiff David Evans's Exit Date was 12/14/03.

* * *

56. Plaintiff Allen Middleton is an adult who was overdetained in the Fulton County Jail and subjected to illegal strip searches.

57. Plaintiff Allen Middleton was arrested by the Fulton County Marshals on 3/8/04 on a warrant for an unpaid $27 traffic ticket from Richmond County.

58. Plaintiff Allen Middleton was committed to the Fulton County Jail on 3/8/04.

59. Plaintiff Allen Middleton's Release Date was 3/8/04.

60. Plaintiff Allen Middleton's Exit Date was 3/11/04.

* * *

71. Plaintiff Harry Witherspoon is an adult who was overdetained in the Fulton County Jail and subjected to illegal strip searches.

72. Plaintiff Harry Witherspoon was arrested by the Fulton County Police on 2/11/04 on a charge of DUI (driving under the influence).

73. Plaintiff Harry Witherspoon was committed to the Fulton County Jail on 2/11/04.

74. Plaintiff Harry Witherspoon's Release Date was 3/10/04.

75. Plaintiff Harry Witherspoon's Exit Date was 3/17/04.

76. Plaintiff Antionne Wolf was arrested by the Fulton County Sheriff on 2/24/04 on a charge of contempt/non-payment of child support is an adult who was overdetained in the Fulton County Jail and subjected to illegal strip searches.

77. Plaintiff Antionne Wolf was committed to the Fulton County Jail on 2/24/04 and subjected to a booking strip search on the same day.

78. Plaintiff Antionne Wolf' Release Date was 4/20/04.

79. Plaintiff Antionne Wolf's Exit Date was 4/21/04.

80. Plaintiff Antionne Wolf was transported to Superior Court for a hearing on 4/20/04.

81. A judge of the Superior Court ordered Plaintiff Antionne Wolf released on 4/20/04.

82. Instead of being released from the courthouse, Plaintiff Antionne Wolf was taken back to the Fulton County Jail and subjected to an illegal strip search even though a judge had ordered her release, and there were no other charges, detainers, warrants or holds or other basis to detain her.

83. Plaintiff Kristopher Alan Matkin was arrested on 3/18/04 by the Atlanta Police Department on a charge of aggravated assault and committed to the Fulton County Jail on the same day.

84. Plaintiff Kristopher Alan Matkin appeared before a judicial officer in the Fulton County Jail on 3/19/04 and the judicial officer dismissed the charges and ordered him released.

85. Plaintiff Kristopher Alan Matkin had no other cases, detainers, warrants or holds preventing his release.

86. But, instead of being released, Plaintiff Kristopher Alan Matkin was booked into the jail, "dressed out" and strip searched, and held several days before being released.

87. Plaintiff Kristopher Alan Matkins' Release Date was 3/19/04.

88. Plaintiff Kristopher Alan Matkins' Exit Date was 3/23/04.

* * *

PARTIES-DEFENDANTS

90. Defendant Jacqueline Barrett was the Sheriff of Fulton County until December 31, 2004. She was previously sued in her official capacity for prospective injunctive relief. She is sued currently in in her individual capacity, for money damages. She was suspended for a period of 60days effective July 24, 2004. A receiver had authority over the Fulton County Jail from July 26, 2004 until December 31, 2004.

* * *

93. At all times described herein, Defendant Jacqueline Barrett, Myron Freeman and each of Karen Handel, Robb Pitts, Tom Lowe, Emma I.

Darnell, Nancy A. Boxill, William "Bill" Edwards was acting under color of state law.

* * *

FACTUAL ALLEGATIONS

Fulton County, The Fulton County Board Of Commissioners, And The Fulton County Jail

* * *

99. The current Fulton County Jail on Rice Street came online in about 1990.

100. The Fulton County Jail at Rice Street ("Fulton County Jail" or sometimes the "Jail") is the primary facility used by Fulton County to house inmates in Fulton County.

101. The Fulton County Jail has a capacity of approximately 1,450 inmates. However, at its opening the County put double beds in the cells and so Fulton County Jail opened with about 2,250 inmates.

102. Currently, the jail houses about 2,900 inmates, with 400 others in two annexes.

103. Most inmates at the Fulton County Jail are either pre-trial detainees, misdemeanants serving misdemeanor sentences, or probation violators.

104. The Board has the power to designate the person(s) to control incarceration facilities, including the Fulton County Jail.

105. The Board has designated the Sheriff of Fulton County as the person to control the County's incarceration facilities.

106. The Board has designated the Sheriff of Fulton County as the person to operate and control the Fulton County Jail.

* * *

110. On December 14, 1992, defendant Jacquelyn Barrett took office as the Sheriff of Fulton County, Georgia.

* * *

The Sheriff's Responsibilities For Inmates At The Fulton County Jail

132. The Sheriff's duties include hiring, disciplining, and firing Jail staff subject to the supervision of the Board.

133. The Sheriff's duties also include formulating, implementing, and executing policies concerning the operation of the Fulton County Jail facilities subject to the authority of the Board.

134. These duties include promulgating policies controlling the strip searches of inmates, and regulations ensuring the release of inmates on their Release Dates.

135. The Sheriff has day-to-day training, supervisory, and disciplinary authority for all operations of the Fulton County Jail subject to the supervision of the Board.

136. The Sheriff is also responsible for ensuring that each employee of the Fulton County Jail discharges his or her duties in accordance with the law, court orders, and authority designated her by the Board.

Criminal Justice Cycle And The Fulton County Jail

137. The steps in an inmate's trip through the criminal justice cycle in Fulton County are: (1) arrest; (2) commitment to the Fulton County Jail as a new commitment; (3) hearing at the Fulton County Jail in the case of felony arrests, or hearing at the courthouse in the case of misdemeanor arrests; (4) transport from the Fulton County Jail to court for subsequent court dates; and (5) return to the Fulton County Jail.

138. A suspect is arrested in Fulton County by the Fulton County Police or other county agent, by the Sheriff, or by a municipal police force.

* * *

154. First Appearances for persons arrested for felons committed to the Fulton County Jail are held in the Fulton County Jail.

155. First Appearances for persons arrested for misdemeanors committed to the Fulton County Jail are held in the State or Superior Court during the week, and in the Fulton County Jail on Saturdays.

156. In-custody defendants are transported from the Fulton County Jail to the State or Superior Court for subsequent hearings such as bond hearings or status hearings.

157. All in-custody defendants transported from the Fulton County Jail to a courthouse for a hearing are returned to the Fulton County Jail after their court appearances ("court returns"), even those entitled to release by virtue of their court appearances.

* * *

Records Room And Operations Of The Records Room

167. The Records Room is the unit of the Fulton County Jail that has responsibility for booking arrestees into the Fulton County Jail. Additionally, these employees create and administer institutional files for inmates, and keep track of inmates to ensuring their release according to their court ordered Release Dates.

168. The Records Room uses a combined system of paper files and computer databases to keep track of inmates, prepare them to be transported to court for court hearings, and process the release and commitment orders generated at the court hearings.

169. When inmates are "booked" into the Fulton County Jail, the Records Room creates, or in the case of a person who has previously been booked into the Fulton County Jail, updates a 4x6 card for each inmate showing his demographic information, his open charges, and his charge history.

170. As part of the booking process, the Records Room staff also checks criminal databases to determine if the new commitment is the subject of any other wants, holds or detainers from other jurisdictions.

171. If there are such holds, the information is noted in the inmate's institutional files, and on the 4x6 card.

172. Whether the inmate is the subject of any other wants, holds or detainers from other jurisdictions is also available in real time on the "Mainframe"

computer, available to Records Room staff and deputies.

173. The Jail and the courthouses have their own computer systems for keeping track of defendants and their court dates, and entering dispositions into the computer systems.

174. As a result, court data, release, and commitment orders issued by judges for in-custody defendants must be faxed from the courthouses to the Fulton County Jail. This information must be processed by hand for each inmate.

175. The large number of inmates in the Fulton County Jail, and the constant flow of inmates and releases, have overwhelmed the outmoded, paper-driven system for processing inmates.

176. Lack of staff and lack of training exacerbates problems caused by the systemic deficiencies in the inmate management system.

177. Chronic absenteeism of Jail staff caused by unsanitary conditions in the Jail exacerbates the problems caused by the systemic deficiencies in the inmate management system.

178. Because of problems and backlogs in the Records Room, many newly committed inmates are not actually booked into the Jail for several days after their commitment.

179. The Fulton County Jail also accepts for commitment to the Fulton County Jail arrestees brought by the Atlanta PD, and the Fulton County Police Department, to the Fulton County Jail without charging or arrest documents.

The Fulton County Jail Policy Of Strip Searching All Arrestees Booked Into The Fulton County Jail

180. Every person booked into the Fulton County Jail general population is subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search, and regardless of the crime with which the person is charged.

181. The booking strip search process involves having the arrested person go into a large room with a group of up to thirty to forty other inmates, remove all of his clothing, and place the clothing in boxes.

182. The arrested person, along with the group, takes a shower.

183. Each arrestee then either singly, or standing in a line with others, is visually inspected front and back by deputies.

184. Inmates and guards refer to the booking strip searches as "dressing out."

185. The Fulton County Jail does not keep any logs or other records of any individual strip searches performed in the booking areas.

186. The City of Atlanta, through its agents, has had notice of the booking strip searches before the class period through communications with county agents, inmates and other methods.

The Fulton County Jail Practice Of Subjecting Certain Persons To Booking Strip Searches After They Have Already Been Ordered Released By A Judge Or Had Their Bond Posted, Or Should Have Been Posted

187. The booking and presentment processes at the Fulton County Jail before and during the class period were so inefficient that many persons were committed to the Fulton County Jail, presented to a judicial officer in the Fulton County Jail or one of the court houses at First Appearance, ordered released by the judicial officer, and then subjected to the booking strip searches (the "dress out" procedure), or, the persons were subjected to the illegal booking searches after they had posted bail or someone had posted it for them.

188. The only reasons Alpha Strip Search Class members were subjected to a booking strip search is because the Fulton County Jail made going through the booking process a condition of release, and it also made an illegal strip search a component of the booking process.

189. The Fulton County Jail's booking process, as administered and acquiesced in, by defendants was so indifferent to the rights of these persons that it made a strip search an element of the booking process, and required the booking process as a condition of release, even after a person was entitled to release by court order or bond.

The Fulton County Jail Policy For Court Returns

190. Every weekday, about 100 to 150 in-custody defendants are transported from the Fulton County

Jail to the Superior Court and the State Court for court appearances.

191. The Records Room does not run checks for wants and holds on in-custody defendants before they are transported to the courthouses for hearings.

192. The Records Room does pull the 4x6 card of each inmate who is going to a courthouse for a hearing the night before the hearing, and puts the cards aside in the Records Room.

193. The in-custody defendants are under the constant supervision of Fulton County Sheriff's deputies while in transit, and while at the courthouses.

194. While at the courthouse, in-custody defendants are not allowed to have contact with anyone apart from Fulton County Sheriff's deputies, except for visits in the lockups with attorneys. These attorney visits are subject to supervision by Fulton County Sheriff's deputies during the visits.

195. After an in-custody defendant appears before a judge, the judge issues an order directing release or further commitment. These orders are reduced to writing by the clerk.

196. The clerk does not enter the disposition into the court computer system in real time.

197. Dispositions are entered into the court computer system later in the day, or the next day.

198. The release and commitment orders are faxed to the Records Room.

199. In-custody defendants whose cases have been discharged are not given the option of being discharged from the courthouse.

200. Every in-custody defendant transported to the Superior Court or the State Court for a court event is sent back to the Fulton County Jail following his court appearance even if the judge has issued a release order. Such persons are sometimes called "court returns".

201. The Fulton County Jail sends these court returns with release orders back to the Fulton County Jail so the Records Room can check for any other open cases with detention orders, warrants, detainers or holds before releasing them.

202. The Records Room relies on its paper records as updated by the faxed court orders. Fulton County has not implemented a county-wide computer inmate management system as it was ordered to do by this Court.

203. Court returns entitled to release are booked back into the Fulton County Jail general populations while the Records Room processes the day's commit and release orders. Even though they are entitled to release, these court returns are not actually released until a later date.

The Fulton County Jail Policy For Court Returns

204. The Fulton County Jail staff subject many court returns to strip searches, even after the court return has been ordered released by a judge, and has no other cases, detainers, warrants, holds or other basis to detain him.

205. These court return strip searches are different from the booking strip searches because they do not involve the "dressing out" process of turning in clothes and going through the showers.

* * *

Illustrative Case

231. Overdetentions happen at practically every event in the criminal justice system from arrest to trial.

232. The problem starts when inmates are committed into the Fulton County Jail without being "booked in"; that is, fingerprinted, identified, checked for outstanding wants, holds, warrants and detainers, and entered into the computerized inmate management system.

233. For example, Plaintiff Alan Powell was arrested and committed into the Fulton County Jail early on the morning of Saturday, March 20, 2004. He was not booked in until approximately 6:00 p.m. the following day; Sunday, March 21, 2004.

234. As a result, Mr. Powell was not taken to the misdemeanor court in State Court for First Appearance, and so was not given a bond hearing.

235. Moreover, even though Mr. Powell was entitled to bail based on a schedule for minor offenses, Jail staff told him that he could not be released on bail until after he was booked.

236. Finally, on the evening of Sunday, March 21, 2004, Mr. Powell was formerly booked into the jail.

237. Along with the booking procedure came a degrading, humiliating strip search.

238. Mr. Powell, and everyone else booked into the Fulton County Jail on Sunday night (or any other night or day), was taken to a large room, told to take off all clothes, put them in a plastic box, and take a shower with the entire group in a single large room.

239. Then each man took his clothes to a counter and exchanged his own clothes for a jail jumpsuit.

240. Before picking up his jumpsuit, Mr. Powell, along with every other inmate in the process, had to stand before a guard front and center, and show his front and back sides while naked.

241. Mr. Powell's family posted his bond on Sunday, March 21, 2004.

242. However, Mr. Powell was not released. When he complained, guards threatened to "lose" his paperwork.

243. Mr. Powell was finally released on Tuesday morning, March 23, 2004.

244. The jail frequently sends recently arrested inmates to bond hearings at State Court before the inmates have been booked in.

245. As a result, the bond hearings are meaningless because the inmates cannot be either charged or bonded out since they have not yet been booked.

246. Without the paperwork generated by a booking, prosecutors lack the documentation necessary to show probable cause. Without probable

cause, judges are forced to throw out cases within 48 hours.

* * *

CLASS ACTION ALLEGATIONS

ARRESTEE STRIP SEARCHES
CLASS ALLEGATIONS

Arrestee Strip Searches Performed on Arrestee Strip Search Class Named Plaintiffs

* * *

271. On March 8, 2004, Plaintiff Allen Middleton was booked into the Fulton County Jail's general population. He was subjected to a strip search without any individualized finding of reasonable suspicion, or probable cause that he was concealing contraband or weapons.

* * *

274. On February 11, 2004 Plaintiff Harry Witherspoon was booked into the Fulton County Jail's general population and subjected to a strip search without any individualized finding of reasonable suspicion, or probable cause that he was concealing contraband or weapons.

"Arrestee Strip Search Class"—
Class Action Allegations

275. The Arrestee Strip Search Named Plaintiffs bring this action under Rules 23(a), 23(b) (2), and 23(b) (3) of the Federal Rules of Civil Procedure on behalf of a class consisting of each person who, in the two years preceding the filing of this action up until the date this case is terminated, was or will be,

(i) upon being arrested and committed into the Fulton County Jail; (ii) on a charge other than a charge of drugs, weapons or felony violence; (iii) was subjected to a blanket strip search without any individualized finding of reasonable suspicion or probable cause that he or she was concealing drugs, weapons or other contraband.

* * *

ALPHA STRIP SEARCHES CLASS ALLEGATIONS

Alpha Strip Searches Performed
By The Fulton County Jail

* * *

296. On 3/19/04, Plaintiff Kristopher Alan Matkin was ordered released by a judicial officer after his case was dismissed at First Appearance.

297. On 3/22/04, after a judicial officer had dismissed his case and ordered him released at First Appearance, Plaintiff Kristopher Alan Matkin was subjected to a strip search without any individualized finding of reasonable suspicion, or probable cause that he was concealing contraband or weapons.

"Alpha Strip Search Class"—Class Action Allegations

298. The Alpha Strip Search Class Named Plaintiffs bring this action under Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of each person who, in the two years preceding the filing of this action up until the date this case is terminated, was or will be, (i) upon being arrested and committed into the Fulton County Jail; (ii) subjected to a

booking strip search without any individualized finding of reasonable suspicion or probable cause that he or she was concealing drugs, weapons or other contraband; (iii) after a judicial officer had ordered his release at First Appearance, or, in the case of persons released without being taken before a judicial officer, after he had already posted bond (or someone had already posted it for him).

* * *

COURT RETURN STRIP SEARCH
CLASS ALLEGATIONS

"Court Return Strip Search Class"—
Class Action Allegations

311. The Court Return Strip Search Named Plaintiffs were subjected to illegal strip searches after their court appearances as described above.

312. The Court Return Strip Search Named Plaintiffs brings this action under Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of a class consisting of: each person who, in the two years preceding the filing of this action up until the date this case is terminated, has been, is or will be: (i) in the custody of the Fulton County Jail; (ii) taken to court from the Fulton County Jail; (iii) ordered released by the court or otherwise became entitled to release by virtue of the court appearance because the charge on which he had been held was no longer pending or was dismissed at the hearing, was ordered released on his own recognizance, or had posted bail, was sentenced to time served, was acquitted or was otherwise

entitled to release; (iv) was not the subject of any other pending case or cases which imposed any condition of release other than personal recognizance; (v) was not the subject of any detainer or warrant; (vi) was returned to the Fulton County Jail; and (vii) was subjected to a strip search without any individualized finding of reasonable suspicion or probable cause that he was concealing contraband or weapons before being released, regardless of whether he was overdetained.

* * *

SUBSTANTIVE ALLEGATIONS

CLAIMS OF ARRESTEE STRIP SEARCH
NAMED PLAINTIFFS

Count 1

Section 1983 Claims Of Arrestee Strip Search
Named Plaintiffs Against Defendants
Jacqueline Barrett and Myron Freeman

404. The Arrestee Strip Search Named Plaintiffs reallege and incorporate by reference all allegations set forth above in this Fourth Amended Complaint.

405. The phrase "Defendants" as used in Counts 1 and 2 herein refer to Defendants Barrett and Freeman.

406. Upon being booked into the Fulton County Jail, each of the Arrestee Strip Search Named Plaintiffs, and every other Arrestee Strip Search Class member, was subjected to a strip search without an individual determination that the search would reveal weapons, drugs or other contraband.

407. Subjecting an arrestee arrested on a non-drug, non-weapon non-violent felony offense to a strip search, without an individual determination that the search would reveal weapons, drugs or other contraband, violates his or her Fourth Amendment and Fourteenth Amendment Rights.

408. Defendant Jacqueline Barrett knew that the Arrestee Strip Search Named Plaintiffs and other class members would be subjected to these searches in the Fulton County Jail, and acquiesced in the searches.

409. On information and belief, Defendant Myron Freeman has continued the strip search policies of Defendant Barrett, and was aware, or should have been aware, that the strip search policies complained of herein were continuing.

410. Defendants' actions, and failures to act as described above, directly and proximately and affirmatively were the moving forces behind the violations of the Arrestee Strip Search Named Plaintiffs, and the class members' Fourth and Fourteenth Amendment Rights.

411. Defendants caused the unreasonable strip searches of the Arrestee Strip Search Named Plaintiffs and all other class members by deliberate indifference to the risk of constitutional injury by maintaining and/or acquiescing in a policy and practice and custom of strip searching arrestees.

412. Defendants are therefore liable under 42 U.S.C. § 1983 for constitutional injuries to the

Arrestee Strip Search Named Plaintiffs and all other class members caused by their conduct.

* * *

CLAIMS OF ALPHA STRIP SEARCH NAMED PLAINTIFFS

Count 5

Section 1983 Claims Of Alpha Strip Search Named Plaintiffs Against Defendants Jacqueline Barrett and Myron Freeman

440. The Alpha Strip Search Named Plaintiffs reallege and incorporate by reference all allegations set forth above in this Fourth Amended Complaint.

441. Each of the Alpha Strip Search Named Plaintiffs, and every other Alpha Strip Search Class member, was subjected to a strip search without an individual determination that the search would reveal weapons, drugs or other contraband, either after a judge ordered his release at First Appearance, or, in the case of persons released without appearing before a judge, after he had posted bail or someone had posted it for him.

442. Subjecting an Alpha Strip class member to such strip searches, without an individual determination that the search would reveal weapons, drugs or other contraband, violates his or her Fourth Amendment and Fourteenth Amendment Rights.

443. The phrase "Defendants" as used in Counts 5 and 6 herein refers to Defendants Barrett and Freeman.

444. Defendants knew that the Alpha Strip Search Named Plaintiffs and other class members would be subjected to these searches in the Fulton County Jail, and acquiesced in the searches.

445. Defendants' actions, and failures to act as described above, directly and proximately and affirmatively were the moving forces behind the violations of the Alpha Strip Search Named Plaintiffs, and the class members' Fourth and Fourteenth Amendment Rights.

446. Defendants caused the unreasonable strip searches of the Alpha Strip Search Named Plaintiffs and all other class members by deliberate indifference to the risk of constitutional injury by maintaining and/or acquiescing in a policy and practice and custom of strip searching Alphas.

447. Defendants are therefore liable under 42 U.S.C. § 1983 for constitutional injuries to the Alpha Strip Search Named Plaintiffs and all other class members caused by their conduct.

* * *

CLAIMS OF COURT RETURN STRIP SEARCH NAMED PLAINTIFFSS

Count 9

Section 1983 Claim of Court Return Strip Search Named Plaintiffs against Defendant Jaquelyn Barrett and Myron Freeman

476. The Court Return Strip Search Named Plaintiffs reallege and incorporates by reference all allegations set forth above in this Complaint.

477. Upon returning from the Superior Court or State Court to the Fulton County Jail after court hearings at which a judge ordered him released, the Court Return Strip Search Named Plaintiffs, and many other Court Return Strip Search Class member, was subjected to a strip search without an individual determination that the search would reveal weapons, drugs or other contraband.

478. Subjecting court returns entitled to release by virtue of their court appearances to strip searches without an individual determination that the search would reveal weapons, drugs or other contraband violates their Fourth Amendment and Fourteenth Amendment Rights.

479. The phrase "Defendants" as used in Counts 9 and 10 herein refers to Defendants Barrett and Freeman.

480. Defendants knew that the Court Return Strip Search Named Plaintiffs and other class members would be subjected to searches in the Fulton County Jail, and acquiesced in such searches.

481. Defendants' actions, and failure to act as described above, directly and proximately and affirmatively were and are the moving forces behind the violations of the Court Return Strip Search Named Plaintiffs' and the class members' Fourth and Fourteenth Amendment Rights.

482. Defendants caused the unreasonable strip searches of the Court Return Strip Search Named Plaintiffs and all other class members by deliberate indifference to the risk of constitutional injury by

maintaining and/or acquiescing in a policy and practice and custom of strip searching arrestees.

483. Defendants are therefore liable under 42 U.S.C. § 1983 for constitutional injuries to the Court Return Strip Search Named Plaintiffs and all other class members caused by their conduct.

* * *

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief:

1) grant a jury trial on all claims so triable;

2) declare that, with respect to the Arrestee Strip Search Class, this action may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) and certify the Arrestee Strip Search Named Plaintiffs as the proper representative of the class consisting of each person who, in the two years preceding the filing of this action up until the date this case is terminated, was or will be, (i) upon being arrested and committed into the Fulton County Jail; (ii) on a charge other than a charge of drugs, weapon or felony violence; (iii) was subjected to a blanket strip search without any individualized finding of reasonable suspicion or probable cause that he or she was concealing drugs, weapons or other contraband.

3) declare that, with respect to the Alpha Strip Search Class, this action may be maintained

as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) and certify the Alpha Strip Search Named Plaintiffs as the proper representative of the class consisting of each person who, in the two years preceding the filing of this action up until the date this case is terminated, was or will be, (i) upon being arrested and committed into the Fulton County Jail; (ii) subjected to a booking strip search without any individualized finding of reasonable suspicion or probable cause that he or she was concealing drugs, weapons or other contraband; (iii) after a judicial officer had ordered his release because of a finding of no probable cause to support the arrest, or, in the case of persons released without being taken before a judicial officer, after he had already posted bond (or someone had already posted it for him).

4) declare that, with respect to the Court Return Strip Search Class, this action may be maintained as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) and certify the Court Return Strip Search Named Plaintiffs as the proper representative of the class consisting of each person who: in the two years preceding the filing of this action up until the date this case is terminated, has been, is or will be: (i) in the custody of the Fulton County Jail; (ii) taken to court from the Fulton County Jail;

(iii) ordered released by the court or otherwise became entitled to release by virtue of the court appearance because the charge on which he had been held was no longer pending or was dismissed at the hearing, was ordered released on his own recognizance, or had posted bail, was sentenced to time served, was acquitted or was otherwise entitled to release; (iv) was not the subject of any other pending case or cases which imposed any condition of release other than personal recognizance; (v) was not the subject of any detainer or warrant; (vi) was returned to the Fulton County Jail; and (vii) was subjected to a strip search without any individualized finding of reasonable suspicion or probable cause that he was concealing contraband or weapons before being released, regardless of whether he was overdetained.

* * *

7) preliminarily and permanently enjoin defendants from pursuing the course of conduct complained of herein;

* * *

9) award all Plaintiffs and class members compensatory and consequential damages in an amount to be determined;

10) appoint an independent monitor to supervise the Fulton County Jail "dress out" area to ensure that all new commitments are not strip searched or subjected to a visual body

cavity search without an individualized finding of reasonable suspicion;

11) appoint an independent monitor to supervise the Records Room to ensure that all inmates are released on or before their Release Dates;

10) award Plaintiffs' attorneys' fees and costs incurred in bringing this action under 42 U.S.C. § 1988; and

11) grant such other relief as this Court deems just and proper.

Respectfully submitted,

/s/William Claiborne
William Claiborne
Charles Pekor
Dan DeWoskin
J.P. Claiborne
Lynne E. Cunningham
Barett S. Litt

* * *

Counsel for all named plaintiffs and all putative class members

JURY DEMAND

Plaintiffs demand a jury of six as to all claims so triable.

/s/William Claiborne
William Claiborne
Georgia Bar # 126360

CERTIFICATE OF COMPLIANCE WITH LR 5DB

I, William Claiborne, do hereby certify that the foregoing motion and other documents have been prepared in 14-point New Times Roman and comply with LR 5dB.

/s/William Claiborne
William Claiborne
Georgia Bar # 126360

Appendix D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:04-CV-1100-RWS

C. ALAN POWELL, et al.,

Plaintiffs,

v.

JACQUELINE BARRETT,

Defendant.

* * *

November 2, 2010

EXCERPTS FROM DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56.1(B), Defendant Jacquelyn Barrett Washington, named in this action as Jacqueline H. Barrett, files this statement of material facts as to which there is no genuine issue to be tried. In support of her Motion for Summary Judgment, this defendant submits the following:

A. Facts Regarding Sheriff Barrett and the Fulton County Jail.

Sheriff Barrett.

1.

Defendant served as Sheriff of Fulton County from 1992 through December 31, 2004. (Barrett Dep., pp., 6, 9.) One of her responsibilities as Sheriff was to administer the Fulton County Jail. *See* O.C.G.A. § 42-4-1.

2.

Sheriff Barrett ceased to have authority with respect to the Jail as of July 23, 2004, when United States District Judge Marvin H. Shoob placed the Jail under the control of a receiver. (*See* Order dated July 14, 2004, *Harper v. Bennett*, Case No. 1:04-cv-1416 (MHS), N.D. Ga.)

3.

Sheriff Barrett had no involvement with the arrests or processing of the individual Plaintiffs in this case. (*See generally* Def. Barrett's Supp. Resp. and Obj. to Plffs' First Set of Interr.)

Jail Procedures: Intake.

4.

From approximately 1994 through March of 2004, Riley Taylor served under Sheriff Barrett as administrative major. (Taylor Dep., pp. 9, 12) His job responsibilities included managing intake, managing central control, and processing inmates out of the jail. (Taylor Dep., p. 13)

5.

After working in the Jail Records Room for about eight months in 2002, Kirt Beasley became a sergeant supervising the Records Room in early spring of 2004. (Beasley Dep., pp. 20-21) In this capacity, she updated inmates' jail cards and the mainframe system with court dispositions, trained staff on the processing of court paperwork, ensured information was updated in the computer system, and prepared inmates for release. (Beasley Dep., pp. 23-24)

6.

Intake is the area where inmates are processed into the jail, including booking, dressing, classification, and medical screening. (McKee Dep., pp. 8-9)

7.

Booking is the process in which jail employees create a booking record; enter charge data from the arrest citation or ticket; collect and enter criminal history data into several computer systems; collect fingerprint data, create fingerprint cards, and submit them to the GBI; take a photo, or mug shot; and interview the inmate to gather biographical information, note emergency contacts, and input the inmate's physical characteristics. (Lane Dep., pp. 25, 31-32; McKee Dep., pp. 18, 22-24, 28-29)

8.

An employee in the intake section examines the committal paperwork to be sure that there is

authority to commit the person to the jail. (Taylor Dep., pp. 20)

9.

As part of the booking process, the inmate's thumbprint is scanned and run through a database to see if he has been arrested before. (Lane Dep., pp. 26-29, 44) This is necessary also to verify the inmate's identity, as many inmates have the same name, the same charges, and similar physical characteristics. (Lane Dep., p. 45) Moreover, many inmates give an alias. (Lane Dep., pp. 45-46)

10.

On average, it took anywhere from three to eight hours after submission of fingerprints into the database for the fingerprints to be processed and the information sent to the jail. (Lane Dep., pp. 34-35.)

11.

Jail staff would run a criminal history in the identification section and in the classification section. (McKee Dep., p. 26)

12.

As part of the booking process, staff searched for outstanding warrants. (Beasley Dep., Vol. 1, p. 140) Release staff had to run checks for warrants and holds on multiple systems, including the clerk's system, GCIC, NCIC, the district attorney's system, etc. If an inmate had aliases or multiple social security numbers, a check had to be run using each name and social security number. (Lane Dec., ¶ 11) Staff would have to wait to get a printout from the GBI. (McKee Dep., p. 77) If the GBI's computer

system was down, then it would take longer. (Lane Dep., p. 35)

Jail Procedures: Court Appearances.

13.

An inmate should receive a first appearance hearing within 48 hours of arrest. (Barrett Dep., p. 17) If a person was booked prior to 2:00 a.m., the practice was to send him to court that morning. (Taylor Dep., p. 78) Sometimes, even an arrestee booked after 2:00 a.m. would go to court that morning. (Taylor Dep., p. 78)

14.

Because of the 48-hour restriction, an inmate could not always complete the entire booking process before his first appearance; in that case, he would complete booking after court. (Barrett Dep., pp. 17, 20; McKee Dep., pp. 35-36)

15.

To speed up the first appearance process, beginning January 3, 2003, the sheriff provided a courtroom in the Jail for felony first appearances. (Barrett Dep., p. 22; Defendant Barrett's Responses and Objections to Plaintiffs' May 23rd Interrogatories, Response to Interrogatory No. 22; Taylor Dep., p. 32)

16.

In 2003, most felony first appearances were at the jail, whereas most of the misdemeanor first appearances were at the courthouse. (Barrett Dep., pp. 47-48; Taylor Dep., pp. 27, 32-34) There were

forty to seventy misdemeanor first appearances per day. (Taylor Dep., p. 32)

17.

Sheriff Barrett later had two more courtrooms constructed at the jail, so that most of the felony and misdemeanor first appearances were held at the jail. (Taylor Dep., pp. 27-28)

18.

At a first appearance hearing, the presiding judge would make rulings that could affect an inmate's release status. (Taylor Dep., pp. 50-51)

19.

While a jail staff person was assigned to the felony courtroom in the jail during 2003, that officer's role was to provide security. (Barrett Dep., pp. 20, 24; Lane Dep., pp. 64-65) The sheriff's office handled the security function; sheriff's employees did not have responsibility to know an arrestee's disposition. (Barrett Dep., p. 30)

20.

Although the sheriff's employee made notations regarding what happened in court in order to track the individual as he progressed through the justice process (McKee Dep., pp. 45, 48-50; Taylor Dep., pp. 54-55), releases were based upon the official court records. (McKee Dep., pp. 50-51, 53-54)

21.

After felony first appearance hearings in the jail, the deputy or detention officer assigned to the

courtroom would make notations on the inmate's No. 1 jail card. (Beasley Dep., Vol. 1, pp. 52-53)

22.

After the first appearance, an inmate's subsequent court appearances were held at the courthouse, not the Jail. (Beasley Dep., p. 45)

Jail Procedures: Strip Searches.

23.

During the period relevant to this action, strip searches of inmates at the Fulton County Jail were governed by a written policy, Jail Bureau Policy and Procedure Number 1500-09, Inmate/Facility Searches and Disposition of Contraband, effective date July 3, 2003, as amended. (Barrett Dep., pp. 45-46 and Exhibit 9)

24.

This policy was amended on March 19, 2004 (Jail Bureau Policy and Procedure 1500-09, Inmate/Facility Searches and Dispositions of Contraband, effective March 19, 2004, Barrett Dep., p. 73 and Exhibit 10) and again on May 28, 2004 (Jail Bureau Policy and Procedure 1500-09, effective May 28, 2004, Barrett Dep., p. 80 and Exhibit 11).

25.

At that time, this policy provided that inmates were subject to strip search at intake and upon being returned to a housing area, but that "[a]ny strip search made for reasons other than as a condition of the intake process or returning inmates to housing

areas, will be conducted only with probable cause ….” (Barrett Dep., Exhibit 9, p. 5)

26.

The strip search incident to the intake process was termed “dressing out,” because jail staff would take the inmate’s clothing and possessions and put the inmate into a jail uniform. (Barrett Dep., pp. 13-14, 37) An inmate was dressed out before entering the general population of the jail, and the inmate was searched at that time for security reasons, so that no contraband was introduced into the main Jail population. (Barrett Dep., pp. 37-38)

27.

An additional reason to have inmates remove their clothes at this stage was to have them shower and/or be sprayed for lice. (Barrett Dep., p. 56)

28.

The Jail’s strip search policy further provided that “[i]nmates housed in Jail Bureau facilities will be strip searched when returning from court appearances, work details, or from any other location where the inmate comes in contact with the public and/or where the inmate has been outside the direct observation of a deputy.” (Barrett Dep., Exhibit 9, p. 6)

29.

Sheriff Barrett wanted inmates returning to the Jail to be strip searched because they had been outside the security of the building and in contact with other people, and a visual search of the body therefore was necessary to ensure that the inmates

did not introduce contraband into the Jail. (Barrett Dep.., p. 53)

30.

In practice, however, searches of inmates returning from court often were less intrusive. (Barrett Dep., pp. 50-51)

31.

Inmates were not strip searched after a first appearance in the Jail, because they did not leave the Jail building. (McKee Dep., p. 123)

* * *

Facts Relating to Individual Strip Search Plaintiffs.

69.

Plaintiffs are former detainees in the Jail who claim that their constitutional rights were violated when they (1) were strip-searched without individualized reasonable suspicion upon being initially placed in or returned to the general jail population, or (2) were detained past midnight on the first day that their release became authorized either by court order or by some legally operative event such as posting bond. (*See* Doc. 78, pp. 5-7 (describing Plaintiffs' strip-search and overdetention claims).)

70.

The only Plaintiff who asserted an Alpha Strip Search claim in the Fourth Amended Complaint, and who remains a Plaintiff in the lawsuit, is Kristopher Matkin. (Doc. 78, pp. 17-18.)

71.

The Plaintiffs who asserted Court Return Strip Search claims in the Fourth Amended Complaint are David Evans, Benjamin Blake, and Antionne Wolfe. (Doc. 78, pp. 17-18.)[1]

72.

Plaintiff David Evans alleged in the Fourth Amended Complaint, and confirmed in his deposition testimony, that the strip search that forms the basis of his claim occurred after a court appearance in August, 2003. (Doc. 78, ¶ 39; Evans Dep., Vol. II, pp. 200-03.)

73.

Mr. Evans further alleged in the Fourth Amended Complaint, and confirmed in his deposition testimony, that he was not ordered released until December 1, 2003. (Doc. 78, ¶ 40; Evans Dep., Vol. II, pp. 206.)

74.

Mr. Evans also signed a form Affidavit, in which all of the pre-printed allegations relating to Court Return strip searches were crossed out. (Evans Dep., Vol. I, Ex. 102.)

75.

In his deposition, Plaintiff Benjamin Blake confirmed as true his prior affidavit testimony that he was not strip searched after a judge ordered him

---

[1] Mr. Wolfe's surname is misspelled "Wolf" in the Fourth Amended Complaint. He is also misidentified as female. *See*, *e.g.*, Doc. 78, ¶ 82.

released or after he paid bond. (Blake Dep., pp. 78-80)

76.

Mr. Blake also testified in his deposition that his interrogatory response #10, in which he stated that he was not strip searched upon being returned to the Jail after the court appearance at which he was ordered released, was correct. (*Id.*, pp. 68-69 and Exhibit 120)

77.

Plaintiff Antionne Wolfe executed a form Class Representative Declaration dated May 15, 2004, in which the following pre-printed statement was crossed out: "I am a member of the CR class because I was strip searched as I re-entered the Fulton County Jail after the court appearance where I was ordered released." (Class Rep. Decl. of Antionne Wolfe dated May 15, 2004, p. 2.)

* * *

Respectfully submitted, this 2nd day of November, 2010.

/s/Leighton Moore
Leighton Moore
William T. Mitchell
Karen E. Woodward
Theodore Howard Lackland
R. David Ware
Steven E. Rosenberg

* * *

Attorneys for Defendant Barrett

Appendix E

EXCERPTS FROM FULTON COUNTY SHERIFF'S DEPARTMENT JAIL BUREAU POLICIES AND PROCEDURES

Effective Date: July 3, 2003	Number: 1500-09	Pages: 10
Chapter: Security and Control Subject: Inmate/Facility Searches and Dispositions of Contraband		Distribution: All Jail Bureau Staff
References: 3-ALDF-3A-18; 3A-19; 3A-20; 3A-33; 3E-09; See Sec. IV.		Amends/Rescinds: January 1, 2002
Approving Authority Signature: Jacqueline Barrett		Date: Annually

I. Purpose

To provide Jail Bureau personnel information regarding approved procedures for suppression of contraband in the Jail Bureau.

II. Policy

It is the policy of the Jail Bureau to have written policy, procedures and practice governing searches to detect and deter the introduction, fabrication, possession and conveyance of contraband. Searches shall be performed on an ongoing basis in accordance with Georgia State Statute for the purpose of security, control of contraband, and staff and inmates safety. Contraband will be disposed of in a proper manner. This policy shall be made available to staff and inmates.

III. Scope

This policy shall apply to all Jail Bureau personnel and reservists.

* * *

VI. Definitions

* * *

Strip Search:

A search requiring an arrested person to remove all of their clothing so as to permit a visual inspection of the genitals, buttocks, anus, breasts, or undergarments.

* * *

Procedure

A. General Information:

* * *

3. All incoming Inmates/Prisoners will be pat-down/strip search during the intake process in accordance with *G.S.S. 4-39*.

* * *

7. All strip searches are conducted by a deputy/detention officer of the same gender as the arrested person and in a location in which the search cannot be observed by persons not physically conducting the search.

* * *

VIII. Strip and Visual Body Searches

Strip searches shall be conducted on all persons committed into the Fulton County Jail in order to prevent the introduction of contraband or weapons. It

is further the policy of the Department that any strip search made for reasons other than as a condition of the intake process or returning inmates to housing areas, *will be conducted only with probable cause and according to procedures outlined herein.*

Visual body cavity searches will be conducted on all persons committed into the Fulton County Jail in order to prevent the introduction of contraband or weapons. It is further the policy of the Department that visual body cavity searches. made for reasons other than as a condition of the intake process will be conducted only with probable cause and according to procedures outlined in *SOP 7.06, Strip and Body Cavity Searches.*

Strip/body cavity searches, not made as a part of the Fulton County Jail Intake procedures, will be reported on the *Fulton County Sheriff's Department Incident Report.* The documented information shall include components as described in *SOP, 7.06 Strip and Body Cavity Searches, Section VII., Reporting.*

* * *

a. Strip Searches:

1. The human body can serve as a potential biding place for contraband. for that reason, it may become necessary to conduct strip search on inmates.
2. All strip searches will be conducted by a deputy/detention officer of the same gender as the person arrested.

3. Strip searches will be conducted in areas where the search cannot be observed by persons not conducting the search.
4. Casts, bandages, and artificial limbs, etc., will be throughly examined by Health Care Staff.
5. Searches conducted during the Admissions and Booking Process
    a. During the admission and booking process, each inmate will be examined for contraband.
    b. Arrested persons entering the booking area will be strip searched under the following circumstances:
        (1). When there is reasonable suspicion based on specific reasons to believe such person is concealing a weapon or contraband, and strip search will result in the discovery of the weapon or contraband.
        (2). When such person has been arrested for drug related or violent offenses, or crimes involving a weapon.
        (3). Prior criminal history of felony weapon charges or contraband related charges.
        (4). When the person refuses to be pat-down/frisk searched or a pat-down/frisk search uncovers contraband or suspicion of contraband possession.
    6. In most instances arrestees who are charged with misdemeanor and/or traffic offenses

will not require a strip search unless one of the conditions listed above in section B 1-4 arc met.

7. All inmates will be strip searched prior to being transferred from pre-magistrate holding to the classification housing unit/holding cell or general population.

8. Inmates who are permitted to be outside the facility without supervision, e.g., weekenders, work release, furloughs, will be strip searched when they return to the secure confines of a facility.

9. Inmates housed in the Jail Bureau facilities will be strip searched when returning from court appearances, work details, or from any other location where the inmate comes in contact with the public and/or where the inmate has been outside the direct observation of a deputy.

* * *

Appendix F

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.