68555-DFG

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

KIM YOUNG and RONALD JOHNSON, and WILLIAM JONES, on behalf of themselves and a class of others similarly situated,
Plaintiffs,

v.

COUNTY OF COOK, MICHAEL F. SHEAHAN, individually and in his official capacity as Sheriff of Cook County, CALLIE BAIRD, individually and in her official capacity as former Director of the Cook County Department of Corrections, SCOTT KURTOVICH, individually and in his official capacity as Director of the Cook County Department of Corrections, SALVADOR GODINEZ, individually and in his official capacity as Director of the Cook County Department of Corrections, et al.
Defendants.

No. 06 C 0552

Judge Matthew Kennelly

Magistrate Judge Geraldine Soat Brown

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON CONSTITUTIONALITY OF SEARCH POLICY**

NOW COME ALL SHERIFF DEFENDANTS ("Defendants"), by and through their attorneys, Querrey & Harrow, Ltd., and moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure, to grant them summary judgment. In support, Defendants state:

**INTRODUCTION**

A visual body cavity search ("visual search") is intrusive. But this discomfort pales in comparison to the mayhem unleashed when weapons and contraband slip into the general prison population. Consequences include assaults, rapes, escape attempts, and murders, the brunt of which is borne by inmates. A visual search reduces the presence of weapons and contraband, as evinced by the voluminous reports of contraband produced by Defendants.

Courts recognize the realities of jail life demand security be the foremost concern. Visual searches facilitate this end as they impede the flow of weapons and contraband, ensuring the safety of staff, detainees, and society at large. This bulwark against jail violence must remain.

## LEGAL BACKGROUND

### A. Summary Judgment.

Summary judgment is proper where the record shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Moriarty v. Svec*, 429 F.3d 710, 716 (7th Cir. 2005). Courts construe the record in favor of the non-moving party. *Id.* Summary judgment is necessary as to both classes of Plaintiffs because no Constitutional violation exists.

### B. Fourth Amendment.

Before considering the propriety of qualified immunity, courts first ask whether the Constitution was violated. *Payne v. Pauley*, 337 F.3d 767, 780 (7th Cir. 2003). The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. Amend. IV. But Fourth Amendment protections are diminished in a correctional setting. *Hudson v. Palmer*, 468 U.S. 517 (1984). Moreover, "courts prudently are deferential to the experienced judgment of prison administrators." *Fernandez v. Rapone*, 926 F.Supp. 255, 260-61 (D. Mass. 1996). The following cases embody these points.

The seminal case on visual search policies is *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell* addressed the very issue before this Court. The facility in *Bell* mandated everyone "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. The policy encompassed everyone, including serious and lesser offenders, and even witness protection participants. *Id.* at 524. The Court upheld the visual search policy. It determined that officers may conduct a search without probable cause if it is reasonable and not motivated by punitive intent. The reasonableness of a search is determined by "balancing . . . the need for the particular search against the invasion of personal rights that the search entails." *Id.* at 559. In doing so, the Court considered "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.*

The justification for the searches and their location motivated the Court. "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." *Bell*, 441 U.S. at 559. This rationale led the Court to conclude a visual search conducted regardless of offense or individualized suspicion was reasonable under the Fourth Amendment.

While the Supreme Court has not revisited prison search policies, it built on *Bell* in *Hudson v. Palmer*, 468 U.S. 517 (1984). *Hudson* considered whether an inmate has a reasonable expectation of privacy in his prison cell. Weighing the societal interests in the security of penal institutions against the privacy interests of inmates, the Supreme Court favored institutional security. "The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.* at 526. The Court observed that prison officials must be "ever alert to attempts to introduce drugs and other contraband into the premises which, we can judicially notice, is one of the most perplexing problems of prisons today." *Id.* at 527. The Court concluded, "it is accepted by our society that 'loss of freedom of choice and privacy are inherent incidents of confinement.'" *Id.* at 528, quoting *Bell*, 441 U.S. at 537. *Bell* was also the cornerstone of *Block v. Rutherford*, 468 U.S. 576 (1984). In *Block*, the Supreme Court upheld a jail policy prohibiting contact visits for pretrial detainees. *Id.* at 588. A blanket prohibition on contact visits furthered security interests because visitors could smuggle contraband. *Id.* at 586.

**C. Summation.**

While inmates retain some privacy rights, their expectations of privacy are diminished. This is reflected by the following. Officers may search cells at random. *Hudson,* 468 U.S. at 528. Officers can search inmates after seeing visitors. *Bell*, 441 U.S. at 537. Officers can search inmates after visiting the prison library or hospital. *Peckham v. Wisc. Dep't. of Corrections*, 141 F.3d 694 (7th Cir. 1998). Finally, inmates may be monitored while showering. *Johnson v. Phelan,* 69 F.3d 144 (7th Cir. 1995). It is in this milieu that the Plaintiffs' claims are evaluated.[1]

**ARGUMENT**

Security in a jail is paramount. This priority curtails the freedoms of inmates. While officers do not have *carte blanche* to impinge on inmates' rights, these axioms afford jails significant discretion to implement security measures. Plaintiffs seek to dismantle a fixture of correctional facilities. In so doing, they elevate inmates' privacy interests to the neglect of institutional security. "Privacy is the thing most surely extinguished by a judgment committing

[1] The factual background is set forth in the Defendants' Motion for Summary Judgment based on Qualified Immunity and incorporated herein.

someone to prison." *Id.* at 146. Because an inmate's expectation of privacy is incompatible with constant surveillance, courts resolve this tension in favor of the correctional facilities.

**A. The Searches are Reasonable Because no Individualized Suspicion is Required.**

The purpose of the Cook County Department of Correction's ("CCDOC") search policy is two-fold: discovery and deterrence. The benefits are innumerable. Searching detainees at intake uncovers a baffling array of items. They include not only transparently troublesome things such as drugs and weapons, but also inherently innocuous items that can be transformed into tools of violence. The specter of being searched also serves the critical function of deterrence. Those who know of the search's thoroughness may refrain from attempting to smuggle contraband.

**1. *Bell* Forecloses Plaintiffs' Claims.**

The facility in *Bell* had a policy that did not require individualized suspicion. Its policy applied to pretrial detainees, prisoners under writs of habeas corpus, "witnesses in protective custody, and persons incarcerated for contempt." *Bell*, 441 U.S. at 524. Thus, the policy applied to even those charged with no wrongdoing. If post-visit visual searches for everyone, including those in protective custody, are acceptable, it is difficult to discern how the CCDOC's policy is unreasonable. Defendants' underlying premise is straightforward: *Bell* controls this case.

Plaintiffs attack the CCDOC's blanket policy. Yet, the policy in *Bell* was just that. Individualized suspicion was not necessary in *Bell*. It is not required here. Moreover, the basis for Plaintiffs' incarceration need not induce the search. The search's *raison d'etre* is the detainee's destination, the CCDOC. Criminal history and particularized suspicion are inconsequential. This is the lesson of *Bell*.

*Bell* and its progeny emphasize institutional security. This factor sounds the death knell of Plaintiffs' case. "The prisoner's expectation of privacy always [must] yield to what must be considered the paramount interest in institutional security." *Hudson,* 468 U.S. at 528. The Eleventh Circuit elaborated that courts intervene only if searches "are devoid of penological merit and imposed simply to inflict pain." *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir. 1995). The importance of Defendants' interest is indisputable: "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."

*Pell v. Procunier*, 417 U.S. 817, 823 (1974). The Seventh Circuit explained, *Bell v. Wolfish* "emphasized what is the animating theme of the Court's prison jurisprudence for the last twenty years: the requirement that judges respect hard choices made by prison administrators." *Johnson*, 69 F.3d at 145. *Bell*'s elevation of institutional security disposes of Plaintiffs' contentions.

The *Bell* Court held that visual searches of every facility inhabitant were reasonable. *Bell* establishes that the Fourth Amendment does not require individualized cause for a visual search. Because Plaintiffs' theory of constitutional injury depends upon such a Fourth Amendment reading, Plaintiffs' claims fail as a matter of law.

**2. Precedent Supports the CCDOC's Search Policy.**

The Seventh Circuit and its District Courts recognize that institutional security is an integral factor in the reasonableness calculation. In *Campbell v. Miller*, 787 F.2d 217 (7th Cir. 1986), the Seventh Circuit upheld a visual search before and after inmates used the prison library. "Prison authorities could legitimately fear that the library might become a depository into and out of which contraband could be smuggled." *Id.* at 228. The searches in *Campbell* are noteworthy because they were conducted without regard to particularized suspicion. *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), involved the same facility. *Bruscino* upheld a manual rectal search of inmates returning to their cells. The court evaluated the search in light of the prison's violence and "with proper regard for the limited competence of federal judges to micromanage persons." *Id.* at 165. The reasonableness of the rectal search did not detain the court long, for the searches revealed "an impressive quantity and variety of contraband." *Id.*

An inmate's challenge to a strip search policy was at issue in *Peckham*, 141 F.3d 694 (7th Cir. 1998). The search was "a visual inspection of a naked inmate without intrusion into the person's body cavities." *Id.* at 695. Officers conducted this search when prisoners returned from another facility, court, or a contact visit. The search was not predicated on individualized suspicion. The Seventh Circuit upheld the policy, "it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable." *Id.* at 697. In *Daughtery v. Harris*, the Tenth Circuit approved of a policy at a federal prison subjecting all inmates to a rectal cavity search before being placed in the custody of U.S. Marshals. 476 F.2d 292 (10th Cir. 1973). The court held, "this policy of allowing rectal searches must be considered reasonable unless contradicted by a showing of wanton conduct." *Id.* at 294.

District Courts in the Seventh Circuit have found individualized suspicion inapplicable in the reasonableness determination. Detainees challenged a CCDOC policy mandating all new detainees submit to a visual search in *Roscom v. Chicago,* 570 F.Supp. 1259 (N.D. Ill. 1983). The court upheld the search, reasoning that *Bell* "does not require a showing of probable cause for visual strip searches of pretrial detainees." *Id.* at 1262. It concluded the jail may reasonably consider any detainees "could be carrying weapons or contraband . . . irrespective of the crimes charged." *Id.* Whether a strip search and manual cavity search were reasonable was the focus of *Vasquez v. Gempeler*, 2008 U.S. Dist. LEXIS 57168 (W.D. Wis. 2008). As to the strip search, the court held, "they are legal under circuit precedent, even if defendants did not have any particularized suspicion that plaintiff had unauthorized items." *Id.* at *2. The court also found the manual cavity search reasonable because legitimate security concerns existed. *Id.* at *3.

These decisions are the blueprint for adjudicating this matter. The approval of analogous policies warrants the same result here. That institutional security is fostered by a visual search is a proposition so evident it needs no illustration. This principle reveals the flaw of Plaintiffs' suit.

**3. Case Law Misconstruing *Bell* is Suspect.**

Despite the above cited precedent and *Bell*'s holding that searches do not require particularized suspicion, some cases have held to the contrary. They are incorrect. Their reliance is dubious because they shun *Bell* and disregard the deference to state correctional facilities. *See Turner v. Safley*, 482 U.S. 78, 85 (1987). "Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." The following are examples of *Bell*'s misapplication.

**a. Appellate Decisions.**

The Ninth Circuit considered the viability of a blanket search procedure in *Kennedy v. Los Angeles Police Dep't.*, 901 F.2d 702 (9th Cir. 1989), *overruled on other grounds*, *Hunter v. Bryant*, 502 U.S. 224 (1991). The court held a policy requiring a visual search of all persons arrested for felonies violated the Fourth Amendment. *Id.* at 716. The Second Circuit held that strip searching detainees charged with misdemeanors absent reasonable suspicion violated the Fourth Amendment. *Shain v. Ellison*, 273 F.3d 56, 66 (2d Cir. 2001). *See also Roberts v. Rhode Island*, 239 F.3d 107 (1st Cir. 2001) (strip searching all arrestees held unconstitutional). While

not binding, these cases demonstrate the departure from *Bell* as they infuse a reasonable suspicion standard that *Bell* never enunciated.

The Seventh Circuit considered a search policy that did not account for individualized suspicion in *Mary Beth G. v. City of Chicago,* 723 F.2d 1263 (7th Cir. 1983). A city policy mandated female misdemeanants be strip searched in city lockups. The Seventh Circuit found *Bell* distinguishable "because the particularized searches in that case were initiated under different circumstances." *Id.* at 1272. The plaintiffs in *Mary G.* were "not inherently dangerous and . . . were being detained only briefly while awaiting bond." *Id.* The concerns of *Bell* were inapplicable, "those dangers are [not] created by women minor offenders entering the lockups for short periods while awaiting bail." *Id.* at 1273. The record supported this finding, during a one-month period the visual search produced no contraband from minor offenders. *Id.*

*Mary G.* is distinguishable. The search in *Mary G.* applied to female arrestees at police stations, not to all persons booked into the general population of the largest jail in the country. The Plaintiffs have also undergone a *Gerstein* hearing in which a judge has found probable cause to detain them. Moreover, the record here is rife with discoveries of contraband, embodied by 2,000 pages of contraband reports. This fact clashes with the lack of contraband in *Mary G.* The substantial violence in the CCDOC further distinguishes *Mary G. See Holly v. Woolfold,* 415 F.3d 678, 679 (7th Cir. 2005) (describing "the dangerous general-population area" of the CCDOC and citing reports of stabbings and murders in the CCDOC). Additionally, *Mary G.* erroneously distinguished *Bell* on the ground that "the detainees [in *Bell*] were awaiting trial on serious federal charges after having failed to make bond." *Id.* at 1272. But the search policy in *Bell* encompassed everyone, including witnesses in protective custody. Because its analysis of *Bell* is mistaken, *Mary G.* rests on a frail foundation.

The Seventh Circuit jurisprudence discussed above is post *Mary G.* Cases like *Bruscino* and *Peckham* represent a retreat from *Mary G.*'s narrow approach. *Mary G.* is of no utility here due to the factual distinctions, its misreading of *Bell*, and recent Seventh Circuit case law.

**b. District Court Decisions.**

Courts in this District have addressed intake searches. The outcomes vary. Some decisions have not given adequate weight to institutional security. *Roscom,* discussed above, contrasts with an unpublished decision striking a blanket strip search policy, *Gary v. Hayes,*

1998 U.S. Dist. LEXIS 13378 (N.D. Ill. 1998). The *Gary* Court framed the issue as "whether the searches conducted on female detainees after they had been ordered released from custody by a judge is unreasonable under the circumstances." *Id.* at *36. It struck the policy, reasoning that officials must have "a reasonable suspicion that the class member is carrying a weapon or contraband." *Id.* This same policy, as applied to males, was litigated in *Bullock v. Sheahan*, 2008 U.S. Dist. LEXIS 59248 (N.D. Ill. 2008). The court invalidated it because "plaintiffs - as individuals for whom there is no longer any basis for detention - clearly have a privacy interest which is arguably greater than that of pretrial detainees." *Id.* at *20. The *Bullock* Court also noted the paltry amount of contraband discovered. *Id.* at *22.

Finally, in *Thompson v. Cook County*, 428 F. Supp. 2d 807 (N.D. Ill. 2006), a jury rejected plaintiff's claim that a strip search violated his Fourth Amendment rights. The District Court granted his motion for a new trial. "Strip searches at the time of intake of a detainee accused of a minor offense violate the Fourth Amendment unless correctional officers have reasonable suspicion to believe that the detainee is concealing contraband." *Id.* at 812. Defendants offered only non-specific evidence that contraband had been recovered. The court refused to consider the fact plaintiff would commingle with the general population because it would give officials "a basis for blanket strip searches of detainees irrespective of the presence of individualized reasonable suspicion." *Id.* at 815.

These cases are distinguishable. *Gary* and *Bullock* involved individuals ordered released by a judge. The Plaintiffs do not fit that description. They are on their way into the CCDOC while the plaintiffs in *Gary* and *Bullock* were on their way out. The privacy interests in *Gary* and *Bullock* were greater than in the instant case. *Thompson* is also unhelpful because it involved a single search, not the search policy itself. The defendants in *Thompson* offered only non-specific evidence of contraband. The 2,000 pages of contraband reports render *Thompson* inapposite. *See* Exhibit 10. Moreover, the plaintiff in *Thompson* was held in civil contempt, "incarcerated not to be punished." *Id.* at 887. *Thompson* did not involve pretrial detainees ordered detained pursuant to a *Gerstein* hearing as here, and thus the case is of marginal significance.

Summarily rejecting blanket search policies stands Fourth Amendment jurisprudence on its head. These cases buoy the delusion that *Bell* mandates individualized suspicion. It does not.

It holds the opposite. This case affords the Court an opportunity to clarify the confusing patchwork of cases and restore the central plank of *Bell*.

**4. The Eleventh Circuit Reaffirms *Bell*.**

The distortion of *Bell* is pervasive. This phenomenon is noted in a recent en banc decision of the Eleventh Circuit, *Powell v. Barrett*, 2008 U.S. App. LEXIS 18907 (11th Cir. Sept. 4, 2008). The court, by a vote of 11 to 1, reaffirmed the holding of *Bell* and lamented its erosion.

*Powell* was a detainee class action challenging a jail's search policy. Under the policy "neither the charge itself nor any other circumstance supplied reasonable suspicion to believe that the arrestee might be concealing contraband." *Id.* at *3. Thus, the plaintiffs were searched "solely because they were entering the general population of inmates at the detention facility." *Id.* The search entailed detainees standing naked in a group of up to 40, with each arrestee "visually inspected front and back by deputies." *Id.* at *5. The policy did not include visual searches. *Id.* at *42. After examining *Bell*, the Eleventh Circuit concluded *Bell* dictated upholding the policy, as privacy expectations could not overcome security interests.

The Eleventh Circuit addressed cases requiring individualized suspicion for a search. These cases included not only those emanating from other circuits, but also its own, *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001). The *Powell* Court rebuked these decisions because they "misread *Bell* as requiring reasonable suspicion." *Powell*, at *23. It explained that *Bell* does not require reasonable suspicion before a search. For *Bell* required "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." *Id.* at *24. The Eleventh Circuit concluded its analysis by highlighting the opportunity detainees have to hide contraband, noting gang members "have all the time they need to plan their arrests and conceal items on their persons." *Id.* at *45.

Some courts have emphasized snippets of *Bell* while gutting its central holding. This Court should endorse the Eleventh Circuit's astute analysis and adhere to *Bell*. *Powell*'s 11 to 1 vote amplifies Defendants' position.

**5. The Potential for Weapons and Contraband are at Their Peak During Initial Intake.**

The CCDOC's interest in security is strongest when detainees are booked into the general population. Courts recognize this process involves substantial risks to jail security. The record

vindicates this view – 2,000 pages of contraband reports. *See* Exhibit 10. The Sixth Circuit's observations in upholding an intake search are apt: "[t]he security interests of the jail in conducting a search at this point were strong. [Plaintiff] was about to come into direct contact with the general jail population." *Dobrowolskyj v. Jefferson County*, 823 F.2d 955, 959 (6th Cir. 1987). The Tenth Circuit made the same determination in *Archuleta v. Wagner*, 523 F.3d 1278 (10th Cir. 2008). It upheld a search based on "the obvious security concerns inherent in a situation where the detainee will be placed in the general prison population." *Id.* at 1284. The First Circuit noted that "[i]ntermingling of inmates is a serious security concern that weighs in favor of the reasonableness, and constitutionality, of the search." *Roberts v. Rhode Island*, 239 F.3d 107, 112 (1st Cir. 2001). These principles apply here.

Courts uphold blanket visual searches when inmates transfer to another area of the prison. In *Arruda v. Fair*, 710 F.2d 886 (1st Cir. 1983), an inmate challenged a policy mandating visual searches when inmates visited the library, infirmary, and visiting room. Invoking *Bell*, the First Circuit upheld the procedure, noting it was "most hesitant to overturn prison administrator's good faith judgments." *Id.* at 887. In *Peckham*, the Seventh Circuit found a strip search of every inmate arriving from another facility or court was reasonable. 141 F.3d at 697.

That the CCDOC's procedure concerns individuals entering the facility does nothing to diminish the import of these cases. In fact, the probability of contraband is greater here because Plaintiffs are coming from outside the CCDOC. It is at this juncture that Defendants be most vigilant. Gang members may get themselves arrested in order to smuggle contraband into prison. Moreover, an arresting officer's pat-down search may miss items which are then concealed during booking. These examples represent real dangers ameliorated by a visual search. The CCDOC's policy minimizes the risks borne by staff and detainees alike.

If searches after trips to the hospital, trips to the library, and trips to other wings are reasonable, logic dictates that searches of those entering the facility from the outside are acceptable. This is a natural application of *Bell*, confirmed by eleven judges on the Eleventh Circuit, and grounded in common sense.

**6. The Felon and Non-Felon Dichotomy is False.**

Courts have fixated on the charges of a detainee in calculating the reasonableness of an intake search. The precise date and locus of this notion's birth are unknown, but it has led a

robust life. However, whether a detainee is charged with a felony or some lesser offense has no basis in Supreme Court prison search jurisprudence.

The Eleventh Circuit criticized this distinction in *Powell.* It pointed to *Masters v. Crouch,* 872 F.2d 1248 (6th Cir. 1989) and *Mary G.,* 723 F.2d 1263. *Powell* at *31. The Eleventh Circuit was blunt: "[t]hose decisions are wrong. The difference between felonies and misdemeanors or other lesser offenses is without constitutional significance . . . [and] finds no basis in the *Bell* decision, in the reasoning of that decision, or in the real world of detention facilities." *Id.* at *32. The Eleventh Circuit is correct. *Bell* is silent as to detainee status. Instead, *Bell* upheld the blanket policy Plaintiffs now ask the Court to strike.

The Eleventh Circuit singles out the Seventh Circuit, and rightly so. Citing *Mary G.*, the Eleventh Circuit notes, "[t]he MCC was hardly a facility where all of the detainees were 'awaiting trial on serious federal charges,' as some of the opinions incorrectly state." *Id.* at *33, *quoting Mary G.* Thus, cases that have distinguished *Bell* on the basis that it involved dangerous offenders are mistaken. *See also Aruda*, 710 F.2d at 887-88 (1st Cir. 1983) ("the strip searches in [*Bell*] were not restricted to particularly dangerous prisoners."). *Bell* made no distinction for less dangerous detainees, or even witness protection participants. These facts render Plaintiffs' contentions futile because misdemeanants need not be excepted.

Claiming a detainee's non-felon status immunizes him from search ignores *Bell* on multiple grounds. First, *Bell* articulated no such distinction. Second, the test is "whether a prison search policy is 'reasonable' under the circumstances." *Aruda*, 710 F.2d at 887. Instead of concluding the search is suspect because the detainee is a minor offender, a court must undertake a balancing of interests. The central factors in that evaluation are the "why" and "where" of the search. But some cases bypass these fundamental questions, with predictable results.

Whether a detainee is charged with a felony or misdemeanor is a distinction without a difference. Finding to the contrary will have deleterious consequences for correctional facilities, as this approach underestimates the criminal mindset. Gangs may exploit the disjunctive treatment between offenders. The Eleventh Circuit concurs. Officials do not know whether a detainee 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." *Powell*, at *36. Endorsing the felony-misdemeanor dichotomy frustrates security. This Court should reject it.

**7. Summation.**

Keeping contraband out of the CCDOC is a task of Sisyphean proportions. Defendants have devised a search policy they deem most effective to detect contraband. The Court should defer to this determination. Blanket search policies that encompass minor offenders and transcend individualized suspicion have the imprimatur of the Supreme Court.

**B. The Manner of the Searches is Reasonable.**

Plaintiffs renounce the manner in which the searches occurred, particularly the intrusiveness of the search and its public nature. But courts "accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). The burden is not on the Defendants to prove the validity of the policy but on Plaintiffs to disprove it. *Id.* In view of the rejection of similar claims, neither class of Plaintiffs can prevail.

**1. Group Searches Are Permissible.**

Courts hold that visual searches in the presence of other inmates and staff are not constitutionally defective. This is so because of security concerns. In *Elliott v. Lynn*, 38 F.3d 188 (5th Cir. 1994), the Fifth Circuit held visual searches conducted before other inmates and correctional officers were reasonable because of security. A District Court in this Circuit entertained the question in *Zunker v. Bertrand*, 798 F.Supp. 1365 (E.D. Wis. 1992). "Visual body cavity searches conducted after contact visits as a means of preventing inmates' possession of weapons and contraband, even absent probable cause, have been found reasonable by the Supreme Court." *Id.* at 1369. The court held, "plaintiff's privacy interest in not having other inmates view the strip searches [did not] outweigh[] the security interests of the prison in this case." *Id.* at 1370. The presence of other inmates during a strip search was found reasonable in *Difilippo v. Vaughn*, 1996 U.S. Dist. LEXIS 8823 at *6 (E.D. Pa. 1996). The District Court in *Fernandez v. Rapone*, 926 F.Supp. 255 (D. Mass. 1996), held similarly. Strip searching inmates in front of others "does not render the searches unreasonable [because a] person's expectation of privacy is unquestionably diminished when he is incarcerated." *Id.* at 262.

The correctional context necessitates a loss of privacy. That inmates lack a reasonable expectation of privacy in their unclothed bodies is also evident from the decisions upholding observation of inmates during showers. *Phelan,* 69 F.3d at 146 (7th Cir. 1995). In *Burge v.*

*Murtaugh*, 2007 U.S. Dist. LEXIS 90736 (N.D. Ind. 2007), the court considered whether surveillance of inmates in the shower violated the Fourth Amendment. It did not, for "the privacy interests of the inmate almost always must yield." *Id.* at *4-5. In *Rhoden v. DeTella*, 1995 U.S. Dist. LEXIS 17354 at *10 (N.D. Ill. 1995), the court found no violation of a prisoner's right to privacy where officials were able to view him in the shower. These cases, while outside the search context, reinforce the view that institutional security cannot be undermined by detainees' privacy demands. That Plaintiffs are searched in front of others is insignificant given the realities of jail life.

**2. Searches in Areas of Limited Privacy Are Permissible.**

Plaintiffs argue the area where the searches occurred is unsuitable. Case law says otherwise. In *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994), the Seventh Circuit considered a challenge to a digital rectal search that transpired in the "lobby area" of a prison. The court upheld the search. It determined the circumstances warranted the location of the search. The court concluded, "[t]his court will not intervene in decisions within the purview of the warden and the Bureau of Prisons. The decision to initiate different methods to search for contraband is not for this court to make in this case." *Id.* at 1042.

The Eighth Circuit reached a similar conclusion in *Franklin v. Lockhart*, 883 F.2d 654 (8th Cir. 1989). An inmate in *Franklin* challenged the manner and place in which officers conducted visual searches - in the hallway where other inmates could watch. Security concerns justified the procedure and since the record did not support a less public method, the searches were constitutional. *Id.* at 657. Finally, the Ninth Circuit held hallway strip searches were reasonable. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988). It reasoned, "so long as a prisoner is presented with an opportunity to obtain contraband or a weapon while outside of his cell, a visual strip search has a legitimate penological purpose." *Id.* at 333.

Plaintiffs' disdain for being searched is not without merit. As the Seventh Circuit has observed, "[t]here is no question that strip searches may be unpleasant, humiliating and embarrassing to prisoners." *Calhoun v. Detella*, 319 F.3d 936, 939 (7th Cir. 2003). But in the same breath, the Court admonished, "not every psychological discomfort a prisoner endures amounts to a constitutional violation." *Id.* Because privacy expectations are at a nadir in jails, conducting searches in a group setting and public area do not implicate constitutional concerns.

**3. The Conditions Surrounding the Search Are Immaterial.**

Plaintiffs' affidavits devote significant attention to the obscene language of officers and the unpleasant conditions. Such issues are irrelevant to this Motion. The two classes of Plaintiffs are defined not on the surroundings of the search, but on the type of search (visual) and the type of the offense charged (less than a felony). Moreover, case law rejects any notion these conditions are actionable as articulated here. Verbal abuse by correctional employees does not state a constitutional claim. *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989); *Mitchell v. Justus*, 2006 U.S. Dist. LEXIS 36656 at *3 (W.D. Vir. 2006). One Northern District Court's comments are noteworthy, "[t]he court notices judicially that foul language and name-calling occur all of the time in prison settings." *Joyner v. Elrod*, 1985 U.S. Dist. LEXIS 23519 (N.D. Ill. 1985). If such occurrences were actionable, "our courts would become arbitrators in thousands of prisoner complaints deciding how actionably obscene was the language." *Id.* at *2. Plaintiffs' cleanliness concerns are likewise irrelevant and precluded by precedent. Unpleasant odors are a natural consequence of prisons and the Constitution does not prohibit discomfort. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). In sum, Plaintiffs' displeasure with the context of the search has no bearing on this Motion.

**4. Summation.**

Policies have consequences. Adopting Plaintiffs' position will inhibit Defendants' job of screening for contraband. It will also exacerbate an already precarious environment. Striking the search policy represents the "unguided substitution of judicial judgment for that of the expert prison administrators" the Supreme Court deemed "inappropriate." *Bell*, 441 U.S. at 554. Precedent, deference, and policy coalesce to warrant a finding that Defendants are entitled to summary judgment on both classes.

**C. Plaintiffs' Due Process and Equal Protection Claims Fail.**

The Fourteenth Amendment states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Due process claims are examined in two steps. First, the plaintiff must demonstrate that a liberty interest exists that the state interfered with, and second, whether the procedures attendant upon that deprivation were constitutionally sufficient. *Lekas v. Briley*, 405 F.3d 602, 607 (7th Cir. 2005). Defendants have established that Plaintiffs' Fourth Amendment claims fail as a matter of law. A court has found probable cause to detain

Plaintiffs per *Gerstein*. (S.O.F. 21-22). Thus, Plaintiffs' due process assertions cannot stand as Defendants have not interfered with any liberty interest.

Plaintiffs' equal protection claim also fails. Detainees must be treated equally, unless unequal treatment bears a rational relation to a legitimate penal interest. *May v. Sheahan*, 226 F.3d 876, 882 (7th Cir. 2000). But the detainees are not similarly situated. Males outnumber females about eight to one. (S.O.F. 11). The different treatment is rationally related to security concerns as the large number of men requires that they be searched in a different area of the jail and a different manner. (S.O.F. 42-43). Males must be strip searched before going to their housing divisions. (S.O.F. 14-15). Any other arrangement would impermissibly slow the process such that detainees would not reach their housing division until the following day. (S.O.F. 50-52). In sum, logistical and budgetary realities render any effort to treat the genders the same impossible. These immutable facts foreclose Plaintiffs' equal protection claim.

## CONCLUSION

What ultimately differentiates this case from Northern District and Seventh Circuit precedent is the 2,000 pages of contraband reports. These pages are fatal to Plaintiffs' cause because they breathe life into the dry, arcane, listless legal terms of "penological interest" and "institutional security." It is these reports that document the crises averted, the violence that did not befall detainees. Make no mistake, the main beneficiary of the search policy is the detainees themselves. Jail weapons are wielded with equal vigor against misdemeanants and felons, and that is why all entrants to the CCDOC must accept a transient unpleasantness early in order to forego a prolonged anguish later.

WHEREFORE, the Sheriff Defendants respectfully request the Court determine that the search policy is constitutional and grant summary judgment as to both classes in their favor. Defendants seek any additional relief the Court deems just.

Respectfully submitted,

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