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 BASED ON QUALIFIED IMMUNITY

NOW COME Defendants, MICHAEL F. SHEAHAN ("Sheahan"), individually and in his official capacity as Sheriff of Cook County, CALLIE BAIRD ("Baird"), individually and in her official capacity as former Director of the Cook County Department of Corrections, SCOTT KURTOVICH ("Kurtovich"), individually and in his official capacity as Director of the Cook County Department of Corrections, and SALVADOR GODINEZ ("Godinez"), individually and in his official capacity as Director of the Cook County Department of Corrections (collectively "Defendants" or "Sheriff Defendants"), by and through their attorneys, Querrey & Harrow, Ltd., and move this Court to dismiss Plaintiffs' claims against the individual defendants based on qualified immunity. In support, Defendants state as follows:

INTRODUCTION

This Motion raises an issue of significant importance: whether correctional officials are entitled to qualified immunity when they followed a jail procedure enshrined in the Illinois Administrative Code and used by the Federal Bureau of Prisons and U.S. Marshals Service. This basis alone is enough to warrant qualified immunity. But there is more. Case law involving jail

search policies is notoriously unpredictable. Courts across the country have struggled to parse Supreme Court jurisprudence on the issue. The result is a patchwork of precedent, the only consistency being its inconsistency. Because case law regarding jail search policies is the antithesis of clarity, qualified immunity is proper. This factor, coupled with state law authorizing the conduct in question leads to the inescapable conclusion that Defendants are entitled to qualified immunity.

FACTS

I. Background Regarding Named Plaintiffs.

Kim Young ("Young"), Ronald Johnson ("Johnson") and William Jones ("Jones"), (collectively, "Plaintiffs") take issue with certain intake procedures at the Cook County Department of Corrections ("CCDOC"). They claim these policies violated their constitutional rights guaranteed by the Fourth and Fourteenth Amendments. Plaintiffs sue pursuant to 42 U.S.C. § 1983.

Young was arrested and held on an outstanding warrant. (S.O.F. 3, 15, 44).[1] Upon arriving at the jail, officers instructed her to remove her clothing and to squat down in front of an officer and cough. (*Id.*) She was behind a partition during this procedure. (Complaint at 8).[2] Johnson entered the CCDOC for possession of drugs. (S.O.F. 4). He was charged with a Class 4 felony pursuant to 720 ILCS 570/402(c). (*Id.*) He went through the intake process with 100 other men. (S.O.F. 11). He was ordered to strip naked. (S.O.F. 4, 14, 15, 30). Finally, Jones was arrested on an outstanding felony warrant. (S.O.F. 5). He went through the CCDOC intake procedure with 100 other men. (S.O.F. 11, 30, 31, 35). He was subjected to a strip search. (S.O.F. 14, 15, 30).

II. Intake Statistics And Procedure.

The CCDOC houses over 10,000 pretrial detainees in ten residential divisions. (S.O.F. 8). New detainees enter through the Receiving Classification and Diagnostic Center ("RCDC"). (S.O.F. 8, 35, 36). Male and female detainees are physically separated. (S.O.F. 9)

Dan Brown ("Brown") was the Assistant Executive Director of the CCDOC during the time period covering Plaintiffs' allegations. (S.O.F. 10). Brown explained that between 250 and

[1] All citations are to Defendants' Rule 56.1 Statement of Facts ("S.O.F."), unless otherwise noted.
[2] All references to "Complaint" are to Plaintiffs' Third Amended Complaint.

350 detainees are booked into and out of the jail daily. (S.O.F. 11). About 300 of those detainees are men and 30 to 40 are women. (*Id*). Of those detainees processed for intake, almost all enter the jail's general population. (S.O.F. 12). There are release mechanisms for non-violent offenders under the *Duran* Consent Decree; as such, there is a high concentration of violent individuals comprising the general population of the Cook County Jail. (*See* Exhibit 12).

III. Statutory Code Provisions and Jail Inspections.

The CCDOC requires that all new detainees be strip searched. (S.O.F. 14). Male detainees are strip searched upon admission. (S.O.F. 14, 15). That search is mandated by sections 701.40(f) and 701.140 of the Illinois Administrative Code. (20 Ill. Adm. Code 701.40(f) (2006)). While not governed by federal prison regulations, the CCDOC search policy is consistent with them. (S.O.F. 16, 18). Strip searches and visual cavity searches are authorized by Federal Bureau of Prisons' regulations and the U.S. Marshals Service directives. (*Id*). The CCDOC's intake procedure is accredited by the American Correctional Association. (S.O.F. 19, 57-59). The Illinois Department of Corrections performs annual inspections of the jail and approves of the intake procedure. (S.O.F. 20).

Before entering the CCDOC, each detainee receives a *Gerstein* hearing in which a judge finds probable cause to detain each individual, in accordance with *Gerstein v. Pugh*, 420 U.S. 103 (1975). (S.O.F. 21). The CCDOC is unique in that it only accepts detainees who have already seen a judge. (S.O.F. 22). When a new detainee arrives at the jail, the Sheriff's deputies are unaware of each detainee's charges. (S.O.F. 13, 23). A visual strip search, and *not* an anal cavity probe, is performed during the intake process. (S.O.F. 30). Before the search, the detainees are lined up and told they will be searched. (S.O.F. 31). At one point, the number of detainees searched varied, ranging from ten to seventy-five. (S.O.F. 32-37). From February 2007 to the present, no more than 35 detainees are visually searched at one time using partitions. (S.O.F. 40).

IV. Contraband.

The strip search prevents the introduction of contraband into the jail. (S.O.F. 24-29, 34, 64). Brown has personally searched new detainees. (S.O.F. 24). He could not recall a single strip search during which contraband was not found. (*Id*). Items routinely discovered include cash,

cigarette packages and lighters. (S.O.F. 26). Drugs and weapons such as razor blades and knives are *de rigueur*. (*Id*).

Defense expert Norman Carlson is a former Director of the Federal Bureau of Prisons and has over fifty years of experience in correctional administration. (S.O.F. 62). He reviewed over 2,000 pages of contraband reports produced during discovery detailing contraband found during intake strip searches at CCDOC. (S.O.F. 27). Carlson observed that inmates with misdemeanor charges were as likely to carry contraband as inmates with more serious charges. (S.O.F. 28). For an example of this scenario, see Exhibit 10, QH 470. Finally, Carlson noted that the Federal Bureau of Prisons recognizes the anal cavity is a common place to smuggle contraband. (S.O.F. 29).

V. Female Intake Search Procedure.

The smaller number of women entering the jail allows for a modified search procedure. (S.O.F. 42). The women go through a body scan machine in the receiving room. (S.O.F. 44). The body scan machine can take five minutes per individual. (S.O.F. 45). The machine does not always detect objects in detainees' mouths, under a flap of skin, or in the body cavity. (S.O.F. 45-49). Detainees have evaded the machine's detection and smuggled contraband into jail. (*Id*). Recidivists can manipulate the scanning machines. (S.O.F. 45). As a result, women are strip searched with the use of partitions – identical to the ones used for male searches. (S.O.F. 44).

VI. Male Intake Search Procedure.

Like the women, males go through an interview process, receive a medical screening, and are given a security level and housing division. (S.O.F. 35). Due to the large number of male detainees, the males are strip searched at the RCDC before going to their housing divisions. (S.O.F. 36). The RCDC is one of the only areas that can accommodate the large number of detainees. (*Id*). Additionally, if the search transpired elsewhere it would increase the time a detainee might have a weapon. (S.O.F. 37).

Detainees would bend at the waist and spread their buttocks so that officers could look for contraband. (S.O.F. 38). One year before Plaintiffs filed their Complaint, Defendants changed the process such that detainees squatted rather than bended at the waist. (S.O.F. 39). In February 2007, Defendants installed partitions in the hallway where the male searches occurred. (S.O.F.

40). However, partitions raise safety concerns, such as using partition parts as weapons and concealment of attacks by detainees. (S.O.F. 41).

Searching males using the same procedures as females would slow the process such that detainees would not reach their housing division in time to attend court, on the following morning. (S.O.F. 50-52). Detainees could not reach their housing locations, eat, shower, or contact family members. (*Id*). The jail is subject to a Consent Decree requiring the intake process be completed within a reasonable time, and eleven hours was deemed unreasonable in *Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988). (S.O.F. 53). Lastly, Sheriff Sheahan was informed by District Court Judge Wayne Anderson, during the settlement of the *prior* female strip search class action that there was no problem with the male strip search. (S.O.F. 54).

VII. Class Certification.

This Court certified two classes based on improper intake procedures.

Class I consists of:

> All males who were subjected to a strip search and/or visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004.

Class II consists of:

> All persons charged only with misdemeanor or lesser offenses not involving drugs or weapons who were subjected to a strip search and/or a visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004.

ARGUMENT

Plaintiffs' allegations and the testimony adduced during discovery demonstrate that any constitutional violations committed against Plaintiffs were the result of a strip search policy, not the conduct of individual Defendants. Moreover, this matter does not involve behavior that is egregious and devoid of social utility, but rather efforts to facilitate important law enforcement interests. There can be little dispute in the worth of combating the scourge of jail violence. Thus, the reasonableness standard militates in favor of finding qualified immunity.

I. This Case Epitomizes Why The Qualified Immunity Doctrine Exists.

Qualified immunity shields officers from liability for civil damages 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). Qualified immunity "gives public officials the benefit of legal doubt," *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), by relieving them from having to decide, at their financial peril, how judges will decide future cases. *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991).

In *Saucier v. Katz,* the Supreme Court set out a two-part test for qualified immunity. 533 U.S. 194, 201 (2001). The threshold inquiry is whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* at 201. If they do not show a right was violated, the inquiry ends and summary judgment based on qualified immunity is proper. Defendants have established in its Motion regarding the constitutionality of the search that the search policy is constitutional and thus this Court need not address the issue of qualified immunity.

Even if the Court disagrees with the Defendants' Motion, Plaintiffs fare no better because qualified immunity applies. In ascertaining the propriety of qualified immunity, the Court must determine "if the right was clearly established." *Saucier,* 533 U.S. at 201. "'Clearly established' within the context of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 639-40. This second question must be answered in light of the specific context of the case. *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004). "The relevant, dispositive inquiry in determining whether a right is clearly established 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 201. "If officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized." *Hunter v. Bryant,* 502 U.S. 224, 229 (1991).

Defendants need only show that reasonable minds could differ as to the lawfulness of their conduct. It is irrelevant in deciding qualified immunity whether there is a "more reasonable" interpretation of the law that may be conceived of after the fact. *Hunter,* 502 U.S. at 228. This distinguishes this Motion from other summary judgment motions. "When reasonable minds could differ, in the typical summary judgment decision the balance tips in favor of the nonmovant while in the qualified immunity context the balance favors the movant." *Ellis v. Wynalda,* 999 F.2d 243, 246 (7th Cir. 1993).

A. The Statutory Law And Administrative Code Establish That The Defendants' Conduct Was Permissible.

In considering the "objective legal reasonableness" of the state officer's actions, one relevant inquiry is whether the defendant relied on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question. *Wilson v. Layne,* 526 U.S. 603, 617 (1993). "The existence of a statute or ordinance authorizing particular conduct is a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Grossman v. City of Portland,* 33 F.3d 1200, 1209 (9th Cir. 1994). "Common sense dictates that reasonable public officials are far less likely to conclude that their actions violate clearly established rights when they are enforcing a statute on the books with no transparent constitutional problems." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003). These axioms dictate qualified immunity for Defendants is proper.

When the searches were performed there was statutory and administrative authority permitting these measures. Specifically, the Illinois Administrative Code, Federal Bureau of Prisons' Directives, and the U.S. Marshals Service Directives authorize strip searches of detainees upon admission into a correctional facility. (S.O.F. 15-19). This troika validates Defendants' actions, which were consistent with these provisions. Defendants acted reasonably in relying on unambiguous state and federal authority as the foundation for their intake procedure. The following synopses of the Illinois and Federal provisions capture their clarity and embody the propriety of Defendants' policies.

1. Regulatory Language Authorizing Strip Searches.

The Illinois Administrative Code provision mandating strip searches at intake states:

> 1) A strip search shall be performed in an area that ensures privacy and dignity of the individual. The individual shall not be exposed to the view of others who are not specifically involved in the process.
> 2) Strip searches shall be conducted by a person of the same sex.
> 3) All personal clothing shall be carefully searched for contraband.
> 4) The probing of body cavities may not be done except where there is reasonable suspicion of contraband.

20 Ill. Adm. Code 701.40(f) (2007).

The Code also provides that "[d]etainees permitted to leave the confines of the jail temporarily, for any reason, shall be thoroughly searched prior to leaving and before re-entering the jail." 20 Ill. Adm. Code 701.140.

The Federal Bureau of Prisons has a similar directive. It instructs personnel to search detainees in a manner more extensive than the CCDOC's policy. The directive provides:

> Staff shall instruct the inmate to lift or move any body folds or creases, to include penis and testicles, or breasts, and excess skin folds.... The inmate shall be asked to turn around facing away from the officer, with the arms extended to the side and the feet about shoulder width apart...The inmate shall be instructed to bend over as far as possible, reach behind and pull buttocks apart to expose the crevice area.
>
> . . .
>
> Male inmates are to be instructed to cough deeply. Female inmates shall be instructed to face the officer, squat and cough deeply. A flashlight shall be used for a visual search of these areas.

Federal Bureau of Prisons, Directive 5800.12, Section 124.

Finally, the U.S. Marshals Service Directives authorize strip searches in a manner that is consistent with the CCDOC's procedures. The Directives mandate strip searches when there is reasonable suspicion. U.S. Marshals Service Directives Section 9.3(D)(3)(a). The U.S. Marshals Service Directives provides:

> When conducting a strip search, the deputy will:
>
> (3) Inspect behind each ear and look inside the prisoner's ear canals, nostrils, and mouth, checking under the tongue, roof of the mouth, and between the lips and gums. Visually inspect down the front of the body, paying close attention to areas such as armpits, breasts; and genital area. Direct the prisoner to face in the opposite direction and conduct a visual inspection of the upper back area.
>
> (4) Direct the prisoner to spread his or her legs and bend forward at the waist. Observe the anus area and genitals from the rear. Conclude with an observation of the bottoms and between the toes of both feet.

U.S. Marshals Service Directives Section 9.3(D)(3)(f)(3)-(4).

The directives also instruct: "[p]rior to accepting a prisoner(s) from a detention facility, institution, or other inside or outside source, deputies may perform their own strip searches as

necessary based on the factors due to the prisoner's contact with individual(s) inside or outside the facility and the need for a thorough search for contraband and/or weapons." *Id.* at (D)(3).

2. The CCDOC's Intake Procedure Parallels the Federal Bureau of Prisons and the U.S. Marshals Service.

Under the Bureau of Prisons' procedure, detainees must bend over as far as possible, pull their buttocks apart, and cough deeply. The federal correctional officers then use a flashlight for the visual search of these areas. The provisions of the U.S. Marshals Service Directives are essentially identical. Detainees at CCDOC must bend over and spread their buttocks, like inmates in federal facilities. During the relevant class period, the CCDOC shifted from this process to one in which the male detainees must squat and cough. This process mirrors how federal female detainees are searched. Moreover, the U.S. Marshals Service Directives instruct deputies to perform strip searches whenever a prisoner is accepted from an outside source. U.S. Marshals Service Directives Section 9.3(D)(3)(g). Thus, the strip search process of the CCDOC is consistent with the directives of the Federal Bureau of Prisons and the U.S. Marshals Service, providing additional support for a finding of qualified immunity.

The Illinois Administrative Code requires the CCDOC strip search all detainees prior to entering the general population of the jail. Thus, non-violent and non-drug related misdemeanants cannot avoid the search process. Illinois law is clear. So are the Federal Bureau of Prisons and U.S. Marshall Directives. They make no distinction between detainees and their respective charges. Again, Defendants' conduct was reasonable because they were acting in accordance with state and federal regulations.

Finally, the American Correctional Association and the Illinois Department of Corrections inspected and certified the CCDOC. (S.O.F. 19, 20, 57-59). These entities did not raise any concerns regarding the intake procedure. (*Id*). Defendants relied on the compliance certifications as evidence that their intake procedure complied with national standards. Additionally, Norman Carlson opined that the searches serve a legitimate penological purpose and are performed in a reasonable manner. (S.O.F. 64) Finally, the John Howard Association, a court appointed monitor pursuant to the *Duran* consent decree, visits the jail approximately fifty times per year and has observed the intake procedure. (S.O.F. 60). It has never objected. (*Id*).

These factors are additional evidence that Defendants had no reason to suspect the search policy violated clearly established statutory or constitutional rights.

For qualified immunity not to apply, "the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Here, it was not. In fact, it was the lawfulness that was apparent. State and federal provisions authorized Defendants' conduct. Thus, Defendants are entitled to qualified immunity.

3. Federal Precedent Dictates Qualified Immunity for Defendants Because They Acted in Accordance With Illinois Law.

It is axiomatic that officials who follow state and federal provisions should be protected by qualified immunity. For a central premise underlying qualified immunity is "the need to avoid unfairly subjecting the official to liability for the good faith exercise of discretion pursuant to a legal obligation." *Coleman v. Frantz*, 754 F.2d 719, 727-28 (7th Cir. 1985). Even officials who depart from prison regulations "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). If officials can maintain qualified immunity despite violating a statutory provision, those who adhere to such provisions deserve qualified immunity. The following cases involve instances in which qualified immunity was found because the officials were acting pursuant to a regulation or statute.

The Supreme Court spoke on this issue in *Wilson v. Layne*, 526 U.S. 603 (1999). *Layne* involved police officers who served an arrest warrant with the media in tow. The Court determined the officers' conduct violated the Fourth Amendment. But the officers were entitled to qualified immunity. Similar to the instant case, the officers' conduct was in accordance with a U.S. Marshals service policy and the local county's policy. Thus, "it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." *Id.* at 617.

Examples of qualified immunity being granted abound in the Northern District. State actors sought qualified immunity against an inmate's claim that he was routinely strip searched in *Roy v. Jenkins*, 1991 U.S. Dist. Lexis 14241 at *16 (N.D. Ill. 1991). The court cited to *Bell*, noting it "held that strip searches of convicted prisoners (and even pretrial detainees) did not violate the Fourth Amendment." *Id.* at *13. This pronouncement, coupled with the plaintiff's failure to state a particularized right existed, led the court to observe, "[the plaintiff] has no right

to be entirely free from strip searches while in prison." *Id.* at *15. Thus, it granted qualified immunity to prison officials because "strip searches are a valid prison security measure rationally related to a legitimate nonpunitive end." *Id.*

In *Baushard v. Martin*, 1993 U.S. Dist. LEXIS 23358 (N.D. Ill. 1993), the court considered whether a police official was entitled to qualified immunity after violating a police officer's due process rights. The official had not provided the officer with an adversarial hearing before discharging him. But the official "was following a CPD regulation which gave him discretion as to whether to institute adversarial proceedings." *Id.* at *18. This necessitated a finding of qualified immunity. In *Johnson v. Remmers*, 2002 U.S. Dist. LEXIS 6518 (N.D. Ill. 2002), prison officials were granted qualified immunity "because they were acting pursuant to facially valid statutes and regulations." The court in *Gonzalez v. Tilmer*, 775 F.Supp. 256, 265 (N.D. Ill. 1991), reached a similar conclusion when it held that an officer who follows a police regulation should be given qualified immunity. *See also Zook v. Brown*, 575 F.Supp. 72 (C.D. Ill. 1983) (sheriff granted qualified immunity regarding his disciplining of employee pursuant to Illinois statute). These cases signify that Defendants' actions were entirely reasonable as they were acting pursuant to the Illinois Administrative Code, Federal Bureau of Prisons directives, and the U.S. Marshals Service directives.

Federal appellate courts have made similar determinations. In *Grossman*, the Ninth Circuit invalidated a municipal ordinance prohibiting demonstrations in a public park without a permit. 33 F.3d 1200 (9th Cir. 1994). But the officer who arrested the demonstrator for violating the ordinance was entitled to qualified immunity. The court reasoned that "when a city council has duly enacted an ordinance, police officers on the street are ordinarily entitled to rely on the assumption that the council members have considered the views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority." *Id.* at 1209. The D.C. Circuit held similarly in *Lederman v. United States,* 291 F.3d 36 (D.C. Cir. 2002). Capitol Police were entitled to qualified immunity because they acted pursuant to a Capitol Grounds Regulation even though the regulation violated the First Amendment.

The Second Circuit's analysis in *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84 (2d Cir. 2003), is also instructive. Connecticut brought suit arguing that New York's Nonresident Lobster Law discriminated against nonresidents of New York. The Second Circuit agreed,

holding the statute violated the Privileges and Immunities Clause of the Fourteenth Amendment. However, the defendants were entitled to qualified immunity. "Without a clear legislative mandate or judicial order invalidating the Nonresident Lobster Law, the individual Appellants erred on the side of caution and relied upon the Nonresident Lobster Law's presumptive validity." *Id.* at 108. Finding this decision "objectively reasonable under the circumstances," the Second Circuit reversed the district court. *Id.*

In sum, even if the Court finds the underlying regulations constitutionally suspect, qualified immunity is still proper. State officials "are charged to enforce laws until and unless they are declared unconstitutional" and "the enactment of a law forecloses speculation by enforcement officers concerning its constitutionality." *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). Accordingly, "even if the statute is arguably unconstitutional," officials are "obligated to enforce it, and [are] entitled to qualified immunity for any constitutional violation that might have resulted." *Egolf v. Witmer*, 421 F. Supp. 2d 858, 876 (E.D. Pa. 2006).

These cases are imbued in common sense. It is inconceivable that officials could be individually liable when they were simply following state and federal guidelines. If the situation were otherwise, officials would be forced to navigate between the Scylla of ignoring the law and being derelict in their duty and the Charybdis of following the law and being individually liable. Courts recognize the intractable nature of such a dilemma. That is why officials in the aforementioned cases were granted qualified immunity. It is also why Defendants are entitled to qualified immunity.

B. Federal Precedent Regarding Strip Searches Did Not Clearly Establish Defendants' Conduct Was Unlawful.

Even if the Illinois Administrative Code and the federal directives are insufficient to bestow qualified immunity, the conflicting case law forecloses any doubt. To determine whether a right was clearly established, the Court looks to analogous cases decided before the defendant took the action challenged. *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir. 1988).

There are several cases permitting strip searches of detainees, as more thoroughly set forth in Defendants' Motion for Summary Judgment.[3] Plaintiffs run headlong into the seminal

[3] Defendants incorporate herein the constitutional contentions in their Motion for Summary Judgment on The Constitutionality of Search Policy.

case of *Bell v. Wolfish,* 441 U.S. 520 (1979). In *Bell*, the Supreme Court held that the blanket policy of visual searches after every contact visit did not violate the Fourth Amendment. *Id.* at 558. The court reasoned that 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. The Supreme Court's pronouncement has been echoed by courts in this Circuit.

"Courts have routinely approved of visual searches of prisoners' rectal and genital areas." *United States v. Oakley*, 731 F. Supp. 1363, 1371 (S.D. Ind. 1990). The district court in *Liston v. Steffes,* 300 F. Supp. 2d 742 (W.D. Wis. 2002), recognized that even minor offenders may be searched without reasonable suspicion if they are placed in the general jail population: "In this circuit, the law is well settled that strip searches may be performed on persons taken into custody on a misdemeanor or traffic violation ... if the person is going to be housed in the general jail population and not simply detained for release upon completion of the booking process." *Id.* at 756-57. Additionally, Illinois courts hold that strip searches of people arrested pursuant to failure to appear for misdemeanor warrants do not violate the Fourth Amendment. *People v. Mitchell*, 353 Ill. App. 3d 838, 840-41 (2nd Dist. 2004); *People v. Johnson*, 334 Ill. App. 3d 666, 672-73 (4th Dist. 2002).

These decisions clash with Northern District cases including *Thompson v. Cook County*, 428 F. Supp. 2d 807 (N.D. Ill. 2006), and *Bullock v. Sheahan*, 2008 U.S. Dist. LEXIS 59248 (N.D. Ill. 2008). This inconsistency necessitates qualified immunity.

Other courts have noted the uncertain landscape of strip search law necessitates qualified immunity. A district court held that a county sheriff was entitled to qualified immunity on claims that his strip search policy was unconstitutional in *Powell v. Barrett,* 376 F. Supp. 2d. 1340 (N.D. Ga. 2005), *aff'd Powell v. Barrett*, 2008 U.S. App. LEXIS 18907 (11th Cir. Sept. 4, 2008) (en banc). It reasoned, "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." *Id.* at 1349. The First Circuit in *Savard v. Rhode Island,* 338 F.3d 23 (1st Cir. 2003), also granted qualified immunity in light of the existing uncertainty over the law of strip searches. *See also Bahrampour v. Lampert,* 356 F.3d

969, 977 (9th Cir. 2004) (upholding qualified immunity where "a conflict in the views of district court judges on the issue [of strip searches] demonstrates that the constitutionality of the regulations was not clearly established"); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir. 1985) (prison strip search "law was not charted clearly."). Conflicting case law in the Northern District and Seventh Circuit warrant the same treatment here.

The tension between the rights of detainees and the demands of institutional security engenders an environment of contrasting approaches. Courts have not provided a clear directive with regards to intake searches. To remedy this situation, courts have applied qualified immunity. This Court should do the same.

C. The Dangers of Jail Violence Warrant a Finding that Defendants' Conduct Was Lawful.

There are additional motivations to find for Defendants, namely, the security of the CCDOC. Institutional security is not an abstraction. Jail violence is endemic. The CCDOC's search policy seeks to stem this tide. The scale of the contraband seized reflects the gravity of the situation. The contraband reports differentiate this case from previous strip search cases. No other jail has created so detailed a record of the extent of smuggling drugs and weapons. No other jail has documented the prevalence of hiding contraband in bodily orifices, where a pat down or metal detector search would be ineffective. These realities demonstrate the dangers the correctional staff and inmates face and confirm the reasonableness of Defendants' actions. A reasonable jail policymaker could have believed that the problem of contraband justified visual searches.

Courts have highlighted the difficulties in striking a balance between the constitutional rights of the detainee and the penological interest in conducting contraband searches. Maintaining institutional security as well as the safety of jail officers and detainees are valid justifications for strip searches. *Stanley v. Henson,* 337 F.3d 966 (7th Cir. 2003) (noting that officers can consider every inmate as a potential carrier of contraband). Because institutional security is a legitimate law enforcement objective, there is a compelling reason for a strip search absent reasonable suspicion. *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003). As a result, courts have invoked qualified immunity to protect correctional officials from strip search suits like this.

CONCLUSION

To reiterate, the dispositive inquiry in a qualified immunity determination is whether a reasonable official would understand that what he was doing was unlawful. Given that Defendants were following the law, the answer suggests itself. The Defendants' conduct in this case was the definition of lawful. The Defendants adhered to administrative code requirements and two sets of federal directives. To hold officials individually liable for conduct imposed by state and federal authorities is untenable with the rationale of qualified immunity.

The ramifications of finding the search policy unconstitutional and Defendants without qualified immunity are far reaching. It will invite a deluge of challenges to federal correctional facilities following the same policy and hinder efforts to quell the rampant violence in correctional facilities throughout the country.

WHEREFORE, the Sheriff Defendants respectfully request that this Court determine that the individual Defendants are entitled to qualified immunity and dismiss all claims against them. Defendants further seek any additional relief this Court deems just.

Respectfully submitted,

THE SHERIFF DEFENDANTS

By: /s/ Daniel F. Gallagher
Daniel F. Gallagher
Querrey & Harrow, Ltd.
175 West Jackson Blvd., Suite 1600
Chicago, IL 60604-2827
(312) 540-7000
I.D. #0905305