UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MICHAEL CANTLEY, Individually, and on behalf of a Class of others similarly situated,
Plaintiff,
v. **No: 3:09-cv-0758**
THE WEST VIRGINIA REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY; and TERRY L. MILLER, both individually and in his official capacity as Executive Director of the West Virginia Regional Jail and Correctional Facility Authority
Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

COME NOW Defendants West Virginia Regional Jail and Correctional Facility Authority (hereinafter referred to as "WVRJA"), and Terry L. Miller, individually and in his official capacity as Executive Director of the West Virginia Regional Jail and Correctional Facility Authority, by and through counsel David J. Mincer, Joshua K. Boggs, and the law firm of Bailey & Wyant, PLLC, and for their *Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint* do state unto the Court as follows:

I. INTRODUCTION

WVRJA maintains a policy by which incoming detainees go through a visual strip search and delousing procedure to ensure that detainees are not concealing weapons or contraband, and are without lice and/or scabies. The WVRJA has determined that such procedures are necessary for safety and health reasons. Plaintiff alleges that the strip search and delousing procedure to which he was subjected subsequent to his arrest and detainment at the Western Regional Jail was a violation of his constitutional right against unreasonable searches and in violation of his right to privacy. Plaintiff further suggests that as a pre-trial detainee detained on only misdemeanor charges, as opposed to a post-conviction detainee or a detainee being held on felony charges, it is a violation

of his constitutional rights to be subjected to these procedures. The United States Supreme Court has previously addressed this exact same issue and the claims of Plaintiff and has held on numerous occasions that a visual strip search and delousing of detainees, including pre-trial detainees charged only with misdemeanors, does not violate their constitutional rights. The Courts have uniformly noted that detainment in a correctional facility inherently comes with certain restrictions and infringements on one's constitutional rights and those restrictions are constitutionally valid if they are related to a legitimate penological interest as opposed to having been implemented purely as a punitive measure as long as there are no outstanding circumstances which heighten the severity of the constitutional violation so that it outweighs the penological interest. As WVRJA's visual strip search and delousing policies are implemented in a minimally intrusive fashion and for the dual purpose of detecting and deterring the smuggling of contraband and weapons into the facilities and to protect the health and safety of all detainees and correctional officers, the policies are instituted for a legitimate penological interest. As such, the WVRJA policies are justifiable and are not a constitutional violation for which this Plaintiff should be permitted to pursue this cause of action against these Defendants.

Furthermore, Plaintiff may not maintain this action, because he has failed to exhaust his administrative remedies within the jail system prior to filing this action. In addition, Plaintiff may not maintain this action, because the Defendants are immune from his claims under the Eleventh Amendment to the United States Constitution and the Will Doctrine. Finally, Defendant Terry Miller is entitled to qualified immunity with respect to the claims asserted against him. For all of the foregoing reasons, the Defendants are entitled to the dismissal of this action.

II. STATEMENT OF FACTS

On September 28, 2008, Plaintiff, Michael Cantley, was arrested at the home of his ex-wife after violating a Domestic Violence Protective Order that was issued against him pursuant to a claim

of domestic violence made by his ex-wife. Following the arrest, Plaintiff was taken to the Western Regional Jail, located in Barboursville, Cabell County, West Virginia. Upon his arrival at the facility, Plaintiff exhibited hostile and violent behavior towards the correctional officers, including threatening to strangle one of the nurses at the facility when she attempted to check Plaintiff's pulse. Because of this behavior, Plaintiff initially had to be restrained until he was calm enough to proceed through the admission process.

After Plaintiff calmed down, he was then "patted down" by one of the correctional officers for the purpose of locating any contraband or weapons concealed in the Plaintiff's clothing. Following the "pat-down," Plaintiff was pre-screened by the medical department and then his clothing and personal belongings were inventoried. Plaintiff was then pictured and finger printed. Next, the Plaintiff was taken to a private shower area and was asked by a male correctional officer to remove his clothing. Plaintiff was asked to squat and cough, and then asked to bend over at the waist. Additionally, Plaintiff was asked to lift his genitals so that the correctional officer could determine that the Plaintiff had not taped anything to his body. Plaintiff was not touched in any way during this procedure. Once the visual search was complete, Plaintiff was sprayed with a non-toxic solution called Liceall and after a short waiting period, he was asked to shower. The purpose of the delousing process is to ensure that the detainee is free of lice and scabies prior to being intermingled with the rest of the prison population. Like the search procedure, Plaintiff was not touched in any way during the delousing.[1] Plaintiff was then issued prison clothing and admitted to the jail.

On or about July 1, 2009, Plaintiff filed a Class Action Complaint with this court naming the West Virginia Jail and Correctional Facility Authority as well as Terry Miller, Executive Director

[1] Plaintiff alleges that some individuals undergoing the strip search procedure are required to undergo a physical cavity search in which a Corrections Officer inserts a gloved finger into the rectum of the detainee; however Plaintiff acknowledges that his search was purely visual. While Plaintiff's allegation regarding other detainees is factually incorrect, that allegation would be irrelevant to his claims in any case. He acknowledges he was not touched during his visual strip search and delousing procedure.

of the West Virginia Regional Jail and Correctional Facility Authority, as Defendants. Plaintiff's Complaint alleged that the Defendants' policy of visually strip searching and delousing all individuals who enter one of the West Virginia Regional Jails, regardless of the crime with which they are charged, constitutes a violation of his privacy rights and the right to be free from unreasonable searches under the Fourth Amendment of the United States Constitution.

On October 9, 2009, Plaintiff filed an Amended Class Action Complaint that is virtually identical in the allegations asserted against these Defendants other than attaching a copy of the WVRJA "Policy and Procedure Statement," dated May 15, 1997[2], and asserting additional allegations regarding the use of a delousing solution in the administration of WVRJA's policy of delousing detainees located within its facilities. Plaintiff seeks to have certified a class action on behalf of himself and other individuals who have been or will be placed into the custody of the West Virginia Regional Jail System after being charged with misdemeanors or other minor crimes and will undergo the visual strip search and delousing procedure prior to their entry into the West Virginia Regional Jail System.[3]

Specifically, Plaintiff alleges that he should not have been subjected to WVRJA's visual strip search and delousing procedure since his charge involved the non-violent offense of violating an Domestic Violence Protective Order. Further, Plaintiff asserts that his charge did not involve a claim that he caused harm to anyone else, but was simply an allegation that he was present in a location where he was forbidden to be pursuant to the Order of Protection. As such, Plaintiff contends that his arrest provided no reasonable basis for jail officials to suspect that he harbored either weapons

[2] While it is assumed that Plaintiff has attached the policy as evidence of a "wholesale" strip search and delousing procedure at WVRJA facilities, with regard to searches the policy only states that inmates being received will receive a "pat search" and that a "a thorough search of the inmate's person shall be conducted when appropriate." Nowhere within the policy is it stated or implied that all incoming detainees are subjected to a strip search. Defendants do not contest that WVRJA policy requires that inmates be deloused prior to being placed in a WVRJA facility.

[3]The Defendants certainly believe that there are numerous reasons why class certification should not be granted and intend to vigorously contest class certification should this Court deny their Motion to Dismiss.

or contraband. While Plaintiff's labeling of his reason for arrest as non-violent is curious given that it was a violation of a Domestic Violence Protective Order, the charges upon which the arrest were made are inapposite factually to the need for a visual strip search and delousing policy to be implemented and, under the controlling case law handed down by the United States Supreme Court, inapposite legally to whether Plaintiff's constitutional rights were violated.

Defendants acknowledge that Plaintiff was visually strip searched and deloused upon his admission to Western Regional Jail, pursuant to WVRJA policy. Additionally, while Plaintiff alleges that a correctional officer conducted the strip search and delousing and observed his shower afterwards, Plaintiff does not allege that anyone else, whether employees of the jail or inmates, witnessed any of the above. As a result of the procedure as described above, Plaintiff now claims that he suffered and is suffering psychological pain, humiliation, and mental anguish. In this regard, Plaintiff seeks the following from these Defendants: monetary damages, a declaration that the Defendants' policies are unconstitutional, and an injunction precluding the Defendants from administering the policies regarding the strip search and delousing of its detainees.

III. STANDARD FOR MOTION TO DISMISS

A motion to dismiss based on *Federal Rule of Civil Procedure* 12(b)(6) for failure to state a claim upon which relief can be granted functions "to test the formal sufficiency of the statement of the claim for relief, and is not a procedure for resolving a contest about the facts or merits of the case." *Henegar v. Sears*, *Roebuck & Co.*, 965 F.Supp. 833 (N.D.W. Va. 1997). In considering a motion to dismiss on 12(b)(6) grounds, a dismissal is granted when "the allegations raised in the complaint clearly demonstrate that plaintiff does not have a claim and that no set of facts would support plaintiff's claim." *Booth v. Old Nat'l Bank*, 900 F.Supp. 836 (N.D.W. Va. 1995). A motion to dismiss should be granted where "it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief." *Collins v. SWVA, Inc.,* 2005 WL

1639305 (S.D.W. Va. 2005). While the Court should accept as true all well-pleaded allegations and should view the complaint in a light favorable to the Plaintiff, "the court need not, however, accept unsupported legal conclusions, legal conclusions couched as factual allegations, or conclusory factual allegations devoid of any reference to actual events." *Collins v. Red Roof Inns, Inc.*, 248 F.Supp.2d 512, 515-516 (S.D.W. Va. 2003). Even viewing the facts alleged by Plaintiff as true, based on the precedent set by our United States Supreme Court, there is no legal basis for Plaintiff's claims and the Defendants are entitled to the dismissal of this action. Furthermore, both Defendants are entitled to dismissal due to Plaintiff's failure to exhaust administrative remedies and under the 11th Amendment and the Will doctrine and Defendant Miller is entitled to immunity from this suit.

IV. ARGUMENT

A. The Supreme Court of the United States established long ago that the significant and legitimate security interests of the institution weigh heavily in favor of conducting strip searches of pretrial detainees on less than probable cause and as such, these searches are not unreasonable and do not constitute a violation of a detainee's right to privacy.

As stated above, Plaintiff asserts that the Defendants' policy, wherein pre-trial detainees charged with non-felonious crimes are strip searched and deloused, is an unreasonable search that is in violation of the Fourth Amendment's protection against unreasonable searches and of the detainee's right to privacy. More specifically, Plaintiff states that the Fourth Amendment specifically "prohibits officers from conducting strip searches and delousing of individuals arrested for misdemeanors or violations absent some particularized suspicion that the individual in question has either contraband or weapons." *See* Complaint, ¶ 40. Plaintiff's position in that regard is directly contrary to controlling law from the United States Supreme Court as set forth in *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884 (1979).

In *Bell*, the Supreme Court considered several challenges made by pretrial detainees in relation to the conditions of confinement and practices present in a federally operated short-term

custodial facility. While most of these challenges are not relevant to the case before this court, one of the challenges brought by the pre-trial detainees concerned the practice of conducting visual body-cavity searches of the detainees. The *Bell* court recognized that pre-trial detainees have not yet been adjudged guilty of any crime and that there is only a "judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest." *Id.* at 536, 99 S.Ct. at 1872. Noting that a pre-trial detainee may not be punished prior to an adjudication of guilt in accordance with due process of law, the court found that the individual may be detained in order to ensure his presence at trial and pursuant to that goal, the individual may be subjected to the restrictions and conditions of the facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution. *Id*. at 536-537, 99 S.Ct. at 1873.

In considering the specific policy that is being challenged, the court must decide whether the policy "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id*. at 538, 99 S.Ct. at 1873 (quoting *Fleming v. Nestor*, 363 U.S. 603, 613-617, 80 S.Ct. 1367, 1374-1376). The Court explained that unless Plaintiff can demonstrate an "expressed intent to punish on the part of facility officials," this determination should be based on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Bell*, 441 U.S. at 538, 99 S.Ct. at 1874 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 567-568. Thus, the *Bell* Court held, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." 441 U.S. at 539, 83 S.Ct. at 1874. With respect to identifying those "legitimate governmental objective[s]", the Court noted that "the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees."

Before addressing the specific constitutional challenges raised by the detainees, the court recognized that while pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that are held by convicted prisoners, "simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations." *Id*. at 545, 99 S.Ct. at 1877. Noting that institutional security as well as internal order and discipline are essential goals that may require limitation or retraction of retained constitution rights, the court held that "prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry" and in this regard, the goal of maintaining institutional security is "central to all other corrections goals." *Id*. at 546-547, 99 S.Ct. at 1878 (quoting *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. 2800, 2804).

Because of the need to preserve institutional security and order, the *Bell* Court recognized that prison administrators have a certain perspective and expertise in this regard that others, including members of the judicial branch, simply do not have. In light of this fact, the Court held that prison administrators "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." 441 U.S. at 547, 99 S.Ct. at 1878. This deference should be afforded because these issues are "peculiarly within the province and professional expertise of corrections officials" and because prison officials "have a better grasp of his domain than the reviewing judge" and "the operation of our correctional facilities is peculiarly within the province of the Legislative and Executive Branches of our Government, not the Judicial. 441 U.S. at 548, 99 S.Ct. at 1879 (citing to *Pell*, 417 U.S. at 827, 94 S.Ct. at 2806; *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807 (1974)).

With the notion that the constitutional rights of pre-trial detainees can be restricted if the restriction is related to a legitimate governmental objective and that deference should be afforded

to prison officials in this regard, the *Bell* Court turned to a consideration of the detainees' challenge with regard to the visual body-cavity searches, which are generically referred to as a "strip search." Just as in the case at issue, the Bell Court was evaluating a purely visual strip search with on touching involved. Just as in Bell, WVRJA strip searches are conducted by a member of the same sex as the detainee. Further, WVRJA strip searches are conducted in a place out of the sight of other staff members and other inmates.

While the Court in *Bell* was confronted with a policy that required inmates, including pre-trial detainees, to expose their bodies for visual inspection following every contact visit with a person from the outside, there is no reason to believe that the court's analysis in this regard would not apply to a policy like WVRJA's that requires the search of a pre-trial detainee when s/he is first brought to the facility. While some jurisdictions have tried to categorize the *Bell* holding in this regard and it is anticipated that Plaintiff will attempt to do the same, there is no reasoning that would support making that type of distinction. At the heart of the *Bell* court's analysis is the reasoning that a visual cavity search is "necessary not only to discover but to deter the smuggling of weapons, drugs, and other contraband into the institution." 411 U.S. at 558, 99 S. Ct. at 1884. It is indisputable that this is the goal behind WVRJA's strip search policy; in fact, Plaintiff makes no allegations to the contrary. Given this fact, there is simply no reason why the *Bell* analysis would not extend to the search of a pre-trial detainee upon his/her initial entry into the facility. Noting that the detainees' allegations of constitutional violations are based on the Fourth Amendment and its various constitutional guarantees, the *Bell* court concluded that visual cavity strip searches of pretrial detainees are not in violation of the Fourth Amendment, as only "unreasonable" searches are prohibited. Evaluating the circumstances and purpose surrounding the strip searches along with the manner in which they are conducted, the court held that the searches were not unreasonable and were not in violation of the detainees' constitutional rights. Given that the policy at issue in *Bell* is

virtually identical to the WVRJA policy, this Court should find that WVRJA's policies are also reasonable and constitutionally sound.

Referencing its articulation of the "reasonableness test" by which the Plaintiff's allegations of constitutional violations should be evaluated, the court held that this test is not able to be defined precisely and should not be applied in a mechanical fashion as each case "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 is conducted." *Bell*, 411 U.S. at 559, 99 S. Ct. at 1884. The Court noted 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. And inmate attempts to secret these items into the facility by concealing them in body cavities are documented in this accord." *Id.* (referencing *U.S. v. Edwards*, 536 F.Supp. 2d 977 (D.Minn. 2008), *Bonner v. Outlaw*, 552 F.3d 673 (8th cir. 2009), *Young v. County of Cook*, 598 F. Supp. 2d 854 (N.D. Ill. 2009), *Allison v. GEO Group, Inc.*, 611 F.Supp.2d 433 (E.D.Pa. 2009), *Young v. County of Cook*, 616 F. Supp.2d 834 (N.D.Ill. 2009), *Chehade Refai v. Lazaro*, 614 F.Supp.2d 1103 (D.Nev. 2009), and *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002)).

Focusing on the allegation that strip searches are a violation of a detainee's right to privacy, the court recognized that strip searches may invade the personal privacy of the individual and also recognized that on occasion a search may be conducted in an abusive fashion. Despite this, the court held that the appropriate question is "whether visual body-cavity inspections ... can ever be conducted on less than probable cause." *Bell*, 441 U.S. 520, 560, 99 S.Ct. 1861, 1885. After "balancing the significant and legitimate security interests of the institution against the privacy interests" of the detainees, the *Bell* court held that the institutional goals or ensuring safety and security in the facility was so detrimental to these facilities that visual body-cavity inspections or

strip searches can be conducted on less than probable cause. Furthermore, the court found that the detainees did not meet their heavy burden of demonstrating that the officials exaggerated their response to the indisputable security concerns at the facility. In the instant case, Plaintiff asserts that his search was conducted without "reasonable suspicion" that he possessed weapons or contraband. It is clear that "reasonable suspicion" as used by the Plaintiff and "probable cause" are referring to the same question of whether there is justification for a correctional officer to believe that a particular detainee may possess weapons or contraband. Thus, *Bell's* analysis regarding probable cause can and should be extended to find that strip searches conducted pursuant to WVRJA policy can be conducted on less than "reasonable suspicion."

Anticipating that lower courts would dissect and compartmentalize its rulings, the *Bell* court included a warning against courts becoming "increasingly enmeshed in the minutiae of prison operations." *Id*. at 561, 99 S.Ct. at 1886. Doing so, the court noted, would go against the spirit of the Constitution since under the Constitution, "the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Id*. The court continued that "the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of "judgment calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of the Government." *Id.* Therefore, unless a particular policy clearly violates a particular Constitutional right or prohibition, the Judicial Branch should be relatively hands-off with regard to the integral decisions unique to prison administration.

After *Bell* was decided, the United States Court of Appeals for the Fourth Circuit had the occasion in *Logan v. Shealy*, 660 F.2d 1007 (1981) to apply those standards enunciated by the *Bell* court in relation to a strip search by prison officials of a female DWI arrestee following her arrest

and arrival at the jail facility. The detainee in *Logan* alleged that the strip search policy was unreasonable in both scope and manner as it was conducted without a warrant or probable cause and therefore, was in violation of various unspecified Fourth and Fourteenth Amendment rights, and constituted cruel and unusual punishment in violation of the Eighth Amendment. Using the balancing test articulated in *Bell*, the court found that the policy in question was unconstitutional in that it "bore no such discernible relationship to security needs ... when balanced against the ultimate invasion of personal rights involved." *Id.* at 1013. The court based its decision on its evaluation of the manner in which this particular search was conducted and the invasion of the detainee's personal rights. In this regard, the *Logan* decision can be distinguished from *Bell* and the case currently before this court. The *Logan* court explicitly based its decision on the fact that the detainee in *Logan* would not have been intermingled with the general jail population as she was simply being held until someone picked her up or until she became sober; and second, the strip search in *Logan* was alleged to have occurred in an area exposed to public view. Neither of these elements are present in the case before this court. The search and delousing of Plaintiff occurred in a shower stall out of the view of other staff members and other detainees. Additionally, the WVRJA strip searches are performed precisely because the detainees are intermingled, thereby increasing the security risk associated with doing anything other than a uniform strip search of all detainees.

Therefore, while Plaintiff may assert that the court should have just taken it for granted that he was not concealing contraband or weapons since his charge was "non-violent," this is a risk that the facility simply cannot bear. It creates the possibility that a "non-violent" detainee will smuggle in and provide a "violent" detainee with a weapon, thus endangering the safety of every individual in the facility. Therefore, given that the *Logan* court's reasoning was based solely on the basis that the particular invasions, which are not present in the case before this court, outweighed the risk of not performing that particular search, *Logan* can be factually and legally distinguished from the case

before this Court.

The standards set forth in *Bell* have went largely untouched by courts who have utilized those standards in the evaluation of constitutional claims made by detainees. Eight years after the court handed down its decision in *Bell*, it took those standards and enumerated specific factors that courts should use in evaluating allegations that a prison regulation has impinged upon a detainee's constitutional rights. In *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987), the court echoed *Bell* and held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987). Although *Turner* concerned regulations regarding the personal relationships of inmates, such as marriages and personal correspondence, the *Turner* standard "applies to all circumstances in which the needs of prison administration implicate constitutional rights," including circumstances where the claim involves a fundamental right. *Washington v. Harper*, 494 U.S. 210, 223-224, 110 S. Ct. 1028, 1037-1038 (1990).

Turner acknowledged the principles enunciated in *Bell* that "running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government" and that, with regard to issues of prison administration and state penal systems, "separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85, 107 S.Ct. at 2259. In acknowledgment of this policy of judicial restraint, the court sought to use the *Bell* principles to formulate a standard of review that would be responsive to both judicial restraint and the need to protect constitutional rights. Hence, the court articulated four factors that a court should consider in determining the reasonableness of a prison regulation: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it," 482 U.S. at 89, 107 S. Ct. at 2262 (quoting *Block v. Rutherford*, 468 U.S. 576,

586, 104 S. Ct. 3227, 3232 (1984)); (2) "whether there are alternative means of exercising the right that remains open to prison inmates," *Id.* at 90, 107 S. Ct. at 2262; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *Id*.; and (4) whether there is a ready alternative to the policy "that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests," *Id.* at 90-91, 107 S.Ct. at 2262.

While it is not necessary for this Court to evaluate these factors as to the WVRJA strip search policy, by virtue of the fact that the same policy was upheld as not a violation of detainees' constitutional rights in *Bell,* it is clear that if this Court engages in that analysis, the strip search policy is clearly non-violative of those rights. There can be no doubt but that the WVRJA strip search policy has a rational connection to regulation of the jails and legitimate governmental interests; that there is no other less intrusive means of achieving the purpose of a strip search; and that the adverse impact on guards, other inmates, and the general public of abandoning the policy is detrimental, severe, and recklessly dangerous.

B. WVRJA's policy of delousing all pretrial detainees regardless of the crime with which they are charged does not violate Plaintiff's constitutional rights in that the policy is rationally related to the legitimate penological interest of preserving the health of all detainees confined within the facility.

Prior to a consideration of WVRJA's policy regarding the delousing of pretrial detainees, it should be noted that this is a unique issue that has not squarely been dealt with in an in-depth fashion. Plaintiff alleges that the delousing procedure to which he was subjected was a violation of his right to privacy and also his right to be free from unreasonable searches. It is unclear, however, upon what facts Plaintiff bases his claim. Plaintiff alleges no direct harm from the delousing and like the strip search procedure, the delousing occurred in a private area with no spectators (other than the attending correctional officers) and involved absolutely no touching. Plaintiff's claim essentially amounts to a claim of a violation of his right to privacy for having to remove his clothing and expose

himself to a correctional officer. This, argument, however is not unique to the delousing procedure since detainees must remove their clothing in order to undergo the visual strip search. Therefore, the *Turner* analysis as it is applied to strip searches is clearly applicable here, as well. Once it is established that the visual strip search policy is constitutional, Plaintiff no longer has a claim with regard to "privacy" as it relates to the delousing procedure, since Plaintiff's allegations regarding the unconstitutionality of the search and delousing procedures rely upon the same central fact - Plaintiff must disrobe in front of a correctional officer. If this withstands constitutional scrutiny as it relates to the visual strip search, then it also withstands constitutional scrutiny with regard to the delousing.

The delousing procedure is implemented to prevent detainees from bringing lice and scabies into the facility and to prevent the spread of lice and scabies among other inmates and other areas of the facility. The closest a Court has come to considering this issue was a case considered by the United States Court of Appeals for the Seventh Circuit. In *Russell, et al. v. Richards*, 384 F. 3d 444 (7th Cir. 2004), the court considered a correctional facility's policy of requiring incoming inmates to use a delousing shampoo in order to rid the inmate of lice. Although *Russell* concerned a claim that the delousing procedure violated the inmates' Fourteenth Amendment due process right to be free from unwanted medical treatment, the court's discussion is applicable here and sheds light on the importance of such a procedure. The court noted that the purpose of administering the delousing shampoo to new inmates was to avoid a lice infestation in the jail. When lice are noticed on an inmate, the inmate and everyone and everything that the inmate has come in contact with must be completely disinfected, which takes a great deal of time and manpower. *Id.* at 446. Evaluating the delousing procedure in light of these goals, the court found that "there is a satisfactory connection between the jail's policy and the interest put forward to justify it" since "the jail has an obligation to ensure the safety and medical well-being of its inmates and its personnel." *Id*. at 448. Additionally, the court held that "the jail has a legitimate interest in preventing its inmate population

and staff from being exposed to lice, not to mention a legitimate fiscal interest in avoiding the costs associated with eradicating a lice infestation." *Id*.

C. Given the facts attendant to Plaintiff Cantley's detention, Plaintiff Cantley cannot in good faith allege that a strip search of him in particular was not warranted and that no reasonable suspicion would exist to support his strip search.

Plaintiff has asserted that absent a reasonable suspicion that a particular detainee might be smuggling contraband or a weapon, there is no basis for said detainee to be strip searched and he uses that argument as the support for his claim of constitutional rights violations. Beyond the fact that the United States Supreme Court has already found that argument to be without merit and a reasonable suspicion to be unnecessary, the actions of Plaintiff Cantley would have provided reasonable suspicion if the Supreme Court required it. He was arrested for violation of a Domestic Violence Protective Order, which is an indication of violence on his part. He was hostile and threatening to correctional officers upon his entry to the facility. See "WV Regional Jail & Correctional Facility Authority Incident Report # 080928" *attached hereto as Exhibit A*. After being secured in a temporary holding cell, Plaintiff began kicking the holding cell door in an attempt to break the glass. See *Exhibit A*. Plaintiff then began kicking the door to the cell in an attempt to cause further damage. See *Exhibit A*. Plaintiff had to be placed in a restraint chair to ensure Plaintiff's safety and to keep him from causing harm to himself or others. See *Exhibit A*. Plaintiff attempted to remove himself from the restraint chair and when a nurse attempted to check Plaintiff's pulse as part of the medical screening process, he menacingly and threateningly grabbed her by the hand. See *Exhibit A*. Plaintiff continually yelled, cursed, and struggled throughout the admission process.

Further evidence of Plaintiff's demeanor and behavior can be found in the "Booking Summary Report" as Plaintiff was noted as being "belligerent" upon arrival at Western Regional Jail for admission. See "Booking Summary Report" *attached hereto as Exhibit B*. A "Watch Log" was also kept with regard to this Plaintiff because of his hostile behavior and confirms the information

provided in the Incident Report referenced above. Specifically, the Watch Log indicates that Plaintiff was yelling, struggling, and threatening to strangle one of the officers. *See* "Inmate Special Watch Log" *attached hereto as Exhibit C.* Given the charges against him and his conduct upon admission, it is clear that if a reasonable suspicion was required of WVRJA, that requirement would have been met in this case.

D. Plaintiff failed to exhaust the administrative remedies available to inmates housed in the WVRJA correctional facilities.

Following the strip search and delousing of Plaintiff, he was housed at the Western Regional Jail for over a month. Throughout his incarceration, Plaintiff voiced no complaints regarding the strip search and delousing procedures, and did not initiate the administrative grievance procedure available to all inmates housed in WVRJA correctional facilities. As such, Plaintiff has failed to exhaust the available administrative remedies.

With regard to the exhaustion of administrative remedies, 42 U.S.C. § 1997e(a) provides that:

> "No action shall be brought with respect to prison conditions under § 1997 of the revised statute of the United States or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

The West Virginia Regional Jail and Correctional Facility Authority provides all inmates with an administrative grievance procedure by which inmates may redress complaints concerning the conditions of their confinement at the facility. All inmates are informed of this procedure as outlined in the Inmate Handbook distributed to each inmate upon admission to the jail. Whenever an inmate feels that he or she has a serious complaint or significant problem, the inmate simply completes an inmate grievance addressed to the Administrator of the facility. Upon receipt of the grievance, the Administrator will, if warranted, investigate the complaint and promptly provide the inmate with a written decision identifying any corrective action taken or reasons why the grievance is denied. An inmate dissatisfied with the Administrator's decision may then appeal directly to the Chief of

Operations. After receiving the appeal, the Chief informs the inmate in writing of any corrective actions taken or the reasons for a denial of the grievance. Finally, the inmate is provided a Level III appeal directly to the Office of the Executive Director. Despite the availability of this multi-level grievance procedure and the steps taken to make it accessible to each inmate, Plaintiff failed to avail himself of the same. *See* "Affidavit" *attached hereto as Exhibit D.*

In *Booth v. Churner*, 532 U.S. 731, 149 L.ed.2d 958, 121 S.Ct. 1819 (2001), the United States Supreme Court held that the Prison Litigation Reform Act requires inmates to exhaust administrative remedies even if the inmate seeks only monetary damages and such relief is unavailable under the administrative process. Additionally, in *Porter v. Nussle*, 534 U.S. 516, 11 S.Ct. 983, 152 L.ed.2d 12 (2002), the United States Supreme Court held that the Prison Litigation Reform Acts' exhaustion requirements are applicable to all inmate suits relating to prison life, whether they involve general circumstances or a particular episode. Regardless of the circumstance, Plaintiff must exhaust the administrative remedies. Plaintiff's failure to utilize and exhaust the administrative process in this case should compel this court to dismiss Plaintiff's Complaint for failure to comply with the requirement imposed by 42 U.S.C. § 1997e(a) that inmates exhaust administrative remedies.

E. The Eleventh Amendment to the United States Constitution as well as the Will Doctrine bar Plaintiff's claim against Defendants.

The United States Supreme Court has held that a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. *Brandon v. Holt*, 469 U.S. 464 (1985). As such, it is not different from a suit against the State itself. Furthermore, it has been held that neither a state, nor its officials, acting in their official capacities are 'persons' under 42 U.S.C. § 1983. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 109 (1989).

A careful reading of Plaintiff's Complaint and Amended Complaint reveals that Plaintiff has named Defendant Terry L. Miller simply because of his official position as a state official, and not

because of any actual deprivation allegedly undertaken by this Defendant. Defendant is an agent of the State instrumentality through his employment with the West Virginia Regional Jail and Correctional Facility Authority, a state agency. As all of the actions alleged in the Complaint were rendered in furtherance of Defendant Miller's official duties in his official capacity as a state official, Plaintiff's claims as to Defendant Terry L. Miller are barred, as are those against the WVRJA.

F. Qualified good faith immunity shields Defendant Terry L. Miller from claims asserted against him in his individual capacity.

Qualified good faith immunity shields a governmental official from liability if the officer's conduct does not violate a clearly established statutory or constitutional right of which a reasonable person in the same position would have known. *Harlow v. Gitzgerald*, 457 U.S. 800, 818 (1982). It has been held that "in determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not on the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." *Pritchett v. Alford*, 973 F.2d 307, 312 (4th Cir. 1992). Moreover, "the manner in which... [the clearly established] right applies to the action of the official must also be apparent." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), citing *Tarantino v. Baker*, 825 F.2d 772, 774 (4th Cir. 1987). Plaintiff has failed to make any allegation that a particular action of Defendant Terry L. Miller violated a right, privilege, or immunity secured to the Plaintiff. As such, Plaintiff's claims against Defendant Miller in his individual capacity should be dismissed.

V. CONCLUSION

The Defendants are entitled to the dismissal of this action. The United States Supreme Court has already evaluated the policy and practice that Plaintiff was subjected to by WVRJA in *Bell* and determined that the practice of visual strip searches of pre-trial misdemeanor detainees is not a violation of their constitutional rights, because it serves a legitimate penological interest to ensure

the order, safety and security of the institution, there is no alternative that could be used to satisfy the same purposes and without it, the safety of correctional officers, other detainees and the general public would be compromised. Although delousing has not been evaluated in as much detail by our nation's highest court, the same reasoning applies and under the factors set forth in Turner, it also cannot be said to be a violation of a detainee's constitutional rights. In addition, even if Plaintiff's position that there needs to be a reasonable suspicion present to justify a strip search is accepted, Plaintiff's conduct would have provided that reasonable suspicion and justified him being strip searched. Furthermore, the Defendants are entitled to dismissal of this action based on Eleventh Amendment immunity and the Will doctrine and due to Plaintiff's failure to exhaust administrative remedies. Finally, Defendant Terry Miller is entitled to qualified immunity for the claims asserted against him.

WHEREFORE, for the foregoing reasons, these Defendants move this Honorable Court to dismiss the Plaintiff's Amended Complaint for failure to state a claim upon which relief may be granted, for the attorney fees and costs incurred by Defendants to be assessed against Plaintiff, and for such further and other relief as this Court deems appropriate.

TERRY L. MILLER and WEST VIRGINIA REGIONAL JAIL AND CORRECTIONAL FACILITY
By counsel

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

MICHAEL CANTLEY, Individually, and on behalf of a Class of others similarly situated,
Plaintiff,
v. **No: 3:09-cv-0758**
THE WEST VIRGINIA REGIONAL JAIL and CORRECTIONAL FACILITY AUTHORITY; and TERRY L. MILLER, both individually and in his official capacity as Executive Director of the West Virginia Regional Jail and Correctional Facility Authority
Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **"Defendants Terry L. Miller and West Virginia Regional Jail and Correctional Facility's Motion to Dismiss and Memorandum of Law in Support"** was served upon the following parties via CM/ECF on this day, Wednesday, October 28, 2009:

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