

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2008

Docket No. 07-0893-cv

(Argued: October 3, 2008

Decided: May 22, 2009)

JOHN KELSEY and TIMOTHY WRIGHT, both individually
and on behalf of a class of others similarly
situated,

Plaintiffs-Appellees,

v.

THE COUNTY OF SCHOHARIE, JOHN S. BATES JR., both individually
and his official capacity as Sheriff of the County
of Schoharie, and JIM HAZZARD, both individually and in
his capacity as Administrator of the Schoharie County
Jail,

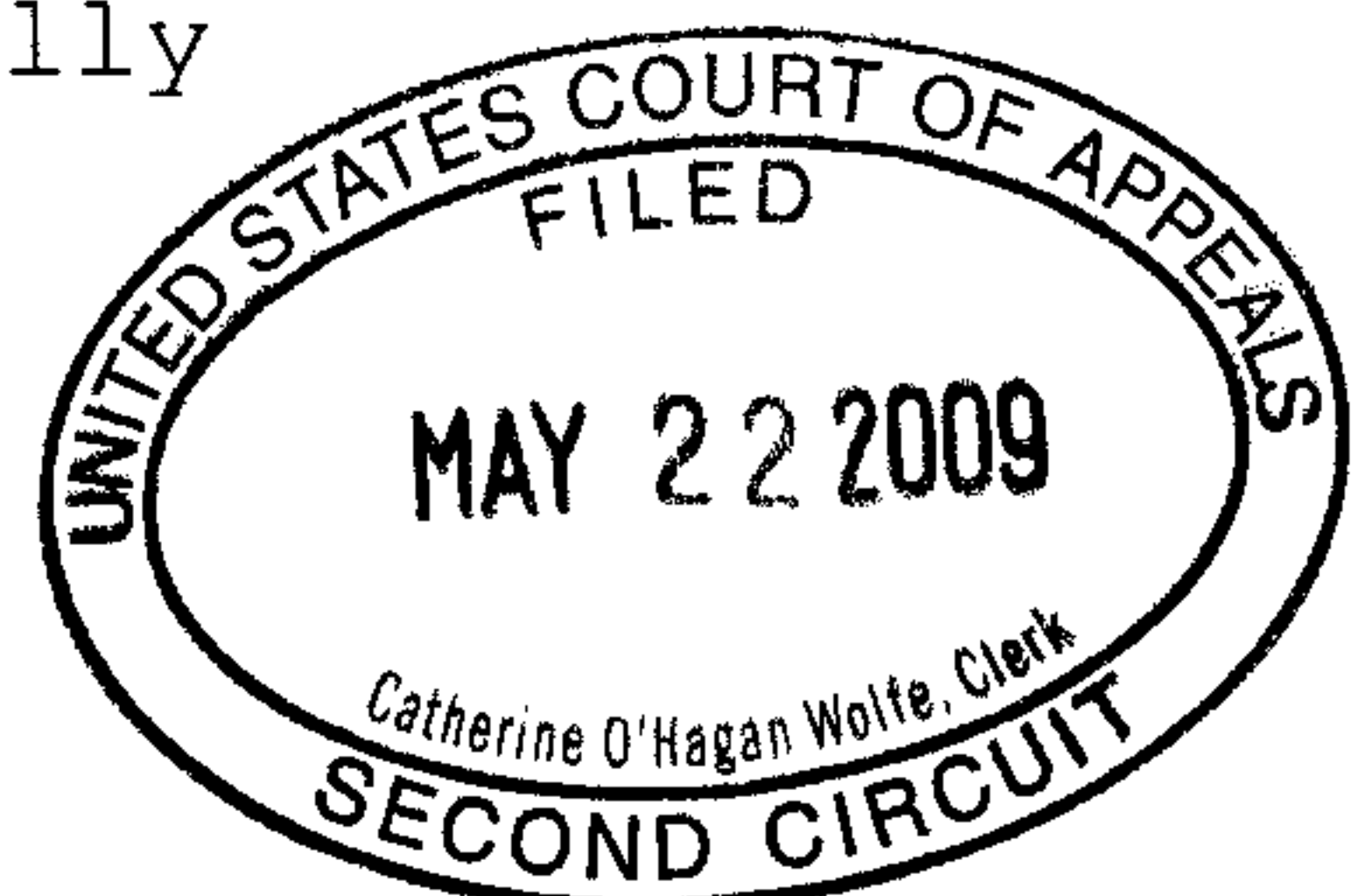
Defendants-Appellants.

Before: JACOBS, Chief Judge, and MINER and SOTOMAYOR, Circuit Judges.

Appeal by defendants-appellants Bates and Hazzard, respectively the Sheriff of Schoharie County, New York, and the Administrator of the Schoharie County Jail, from a Decision and Order of the United States District Court for the Northern District of New York (Kahn, J.) denying their motion for summary judgment in an action for injunction and damages challenging a clothing exchange procedure for newly admitted jail inmates as a strip search violative of the Fourth Amendment when executed without reasonable suspicion, the appellants having asserted, inter alia, the defense of qualified immunity.

Decision and Order reversed and remanded with instructions to dismiss the action.

Judge Sotomayor dissents in a separate opinion.



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2 Beranbaum Menken Ben-Asher &
3 Bierman, LLP, New York, New York,
4 for Plaintiffs-Appellees.

5 E. Robert Keach III, Law Offices of
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8 Plaintiffs-Appellees.

9 Gregg Johnson, Girvin & Ferlazzo,
10 P.C., Albany, New York, for
11 Defendants-Appellants.

1 MINER, Circuit Judge:

2 **INTRODUCTION**

3 Defendants-appellants John S. Bates Jr., Sheriff of
4 Schoharie County, New York, and Lt. Jim Hazzard, Administrator of
5 the Schoharie County Jail (together, the "defendants") appeal
6 from a Decision and Order entered in the United States District
7 Court for the Northern District of New York (Kahn, J.) denying
8 their motion for summary judgment in an action brought against
9 them by plaintiffs-appellees John Kelsey and Timothy Wright
10 (together, the "plaintiffs"). Kelsey v. County of Schoharie, No.
11 1:04-CV-299, 2007 WL 603406 (N.D.N.Y. Feb. 21, 2007). The County
12 of Schoharie is also named as a defendant in the action and
13 joined in the motion. The plaintiffs seek an injunction and
14 damages, claiming that the clothing exchange procedure for newly
15 admitted inmates at the Schoharie County Jail constitutes a strip
16 search violative of the Fourth Amendment when executed without
17 reasonable suspicion. The defendants, sued in their official and
18 individual capacities, base their motion for summary judgment,
19 inter alia, on the defense of qualified immunity. The learned
20 District Court, identifying a possible constitutional violation,
21 found "material facts" in dispute and therefore rejected the
22 defense of qualified immunity, with leave to reassert the defense
23 "at the proper time." Kelsey, 2007 WL 603406, at *8. For the
24 reasons that follow, we reverse the Decision and Order of the
25 District Court and remand with instructions to dismiss the
26 action.

BACKGROUND

I. The Clothing Exchange According To Defendants

The Schoharie County Jail is operated by the Schoharie County Sheriff's Department under the direction of Sheriff Bates. Day-to-day responsibility for the facility is vested in Lt. Hazzard as jail administrator. Bates and Hazzard have established and implemented procedures for the admission of male inmates to the facility and state that they have familiarized and trained all subordinate personnel at the facility in these procedures. Included in the intake procedure is a clothing exchange, whereby newly admitted inmates are issued distinctive facility clothing in exchange for their street clothes. This clothing exchange requirement is applied only to those male inmates who are not expected to make bail and therefore are to be confined in a housing unit at the jail. According to Sheriff Bates,

[t]he purposes of the clothing issue include, ensuring that each inmate has clean clothing free of infestation and to make sure that inmates are clearly identifiable and can be readily distinguished from visitors, members of the public and staff. For some inmates, the facility-issued clothing is better than the clothing and personal care items they have outside the facility and thus may positively impact their state of mind while being housed at the [jail]. The issuance of clothing is commonly referred to as the clothing exchange process.

Before the clothing exchange, a new inmate undergoes a booking procedure. He is first transported from a sally port to a holding area containing two holding cells next to a control room and booking room. In the holding area, the inmate is

1 required to remove his coat (if any) and empty his pockets.
2 Thereafter, he is subjected to a "pat frisk" and sometimes to a
3 search by a hand-held metal detector, all while the inmate is
4 fully clothed. According to the Sheriff, no other type of search
5 is authorized during the intake period. The inmate then is
6 placed in a holding cell within the holding area until the
7 admitting corrections officer is ready to proceed with the
8 booking process.

9 The inmate is next required to sit beside a window in the
10 holding area. The booking room is on the other side of the
11 window, through which the inmate is interviewed by the
12 corrections officer. The officer enters the answers to his
13 questions into a computer. The questions pertain to such matters
14 as pedigree, medical information, scars and tattoos. Next, the
15 corrections officer in charge of the booking procedure returns to
16 the holding area, where he photographs and fingerprints the
17 inmate. The inmate remains in his street clothes throughout the
18 booking process.

19 It is only after the booking process is completed that the
20 clothing exchange takes place for those inmates who are to be
21 confined in one of the housing units. Although there is no
22 written policy for the clothing exchange itself, the defendants
23 insist that they have established a protocol for the clothing
24 exchange and have instructed all jail personnel in the protocol
25 as follows: A corrections officer produces in the holding area a
26 mesh property bag into which the inmate is to place his clothes.

1 The officer instructs the inmate to stand on one side of a 42" x
2 48" masonry half-wall with the officer on the other side. The
3 officer then lays out on the half-wall the jail uniform, a 48"
4 long white towel, soap and other personal items. The inmate is
5 then instructed to disrobe and place his street clothes into the
6 mesh bag, which is held open by the officer on the other side of
7 the half-wall. The inmate may use the towel for privacy as he
8 disrobes preparatory to taking a required shower and dressing in
9 the jail uniform.

10 While the inmate is showering, the officer takes the
11 inmate's street clothes to a property room across the hallway
12 from the holding area. There, the officer inspects the clothing
13 for contraband, tags it, and sends it to the laundry room for
14 washing. When he returns to the holding area, he escorts the
15 newly clothed inmate to the appropriate housing unit. The
16 protocol does not call for the officer to conduct a personal
17 search or body inspection or to observe the inmate taking a
18 shower or getting dressed. Although there is no written policy
19 specifically addressed to the clothing exchange procedure, there
20 is a written policy entitled "Inmate Processing." Within that
21 policy is a provision for medical screening which provides: "A
22 visual analysis of the inmate will be conducted throughout the
23 admission process."

24 A written policy for strip searches and body cavity searches
25 has been established at the jail under the title "Control of and
26 Search for Contraband." It provides that "[a] 'strip/strip frisk

1 search' shall not be routinely conducted." Such a search is
2 allowed only "[w]here an officer has made a determination that
3 there is reasonable suspicion to believe that the inmate should
4 be searched" or "[w]here an officer has reasonable suspicion to
5 believe an inmate is hiding contraband on his person and/or the
6 inmate is in possession of contraband." The policy provides that
7 "[w]hen inmates cooperate in the conduct of a strip/strip frisk
8 search, the inmate's body will not be touched." Body cavity
9 searches in the jail "[m]ay be authorized only in circumstances
10 where there are compelling reasons to believe that the inmate(s)
11 to be searched have secreted in a rectal/vaginal cavity
12 contraband, the nature of which constitutes a clear threat to the
13 safety and security of the facility and/or a threat to the safety
14 and well being of any person." Sheriff Bates "do[es] not recall
15 a single occasion when a [b]ody cavity search was conducted on an
16 inmate during [his] tenure as Sheriff."

17 Sheriff Bates has put forth the proposition that "the
18 clothing exchange procedure is not intended as a personal search
19 of the inmate but rather a brief administrative process that
20 precedes newly-admitted inmates['] transport to a housing unit."
21 He has represented, "[u]pon information and belief," that
22 "inmates are never instructed to squat, bend, turn, open their
23 mouth, manipulate their body, or in any other manner expose
24 themselves for a personal search or inspection" during the
25 clothing exchange. Jail Administrator Hazzard avers that
26 corrections officers at the jail have been trained to perform the

1 prescribed clothing exchange procedure and that "[t]he clothing
2 exchange is simply intended to get inmates into the jail uniform
3 and secure their street clothing on their way to housing."
4 However, he is aware of three occasions when the prescribed
5 procedure was not followed: On one occasion, the corrections
6 officer left the holding area and left the inmate alone to change
7 out of his street clothes and into his prison clothes and to
8 shower. On the other two occasions, the corrections officer
9 caused the clothing exchange to take place in the holding cell
10 instead of allowing the inmate the benefit of the privacy
11 afforded by the masonry half-wall.

12 II. The Clothing Exchange According To Plaintiffs

13 Plaintiff Kelsey arrived at the Schoharie County Jail on
14 October 16, 2002, having been transported there from the Albany
15 County Jail, where he worked as a corrections officer. He had
16 been arrested for a civil violation of the Family Court Act in
17 connection with a child support matter. He underwent the booking
18 procedure, including photographing and fingerprinting, before the
19 required clothing exchange. He testified at his deposition that
20 a corrections officer laid out the jail uniform on a bench in
21 front of the half-wall. He proceeded to take off his street
22 clothes in the open booking area, as directed, in order to put on
23 the jail uniform. Kelsey asked the officer if he had to remove
24 his underwear, and the officer replied: "Yes. Everything." The
25 officer stood directly in front of Kelsey during the clothing
26 exchange, and Kelsey placed his street clothes into a clear

1 garbage bag at the request of the officer.

2 In his deposition, Kelsey stated that he asked the officer
3 during the clothing exchange: "Do I have to do this here?" and
4 that the officer answered: "Yes, you do." Kelsey testified that
5 the officer's "eyes were looking up and down my body, so I assume
6 he saw my genitals." Kelsey found the entire process
7 "embarrassing" and "[h]umiliating." Kelsey testified that during
8 the clothing exchange he was not prevented from turning around,
9 from going behind the half-wall or from using the towel or the
10 bag to obscure the officer's view of his body. He also stated
11 that he was not required to lift his arms, to open his mouth, to
12 expose his buttocks or to manipulate any part of his body. He
13 did not indicate that he was touched by the officer in any way.

14 The Cobleskill Police Department brought plaintiff Wright to
15 the Schoharie County Jail at about 3:30 a.m. on September 5,
16 2003, after Wright's arrest for driving while intoxicated. In
17 his deposition, Wright testified that, following his interview at
18 the jail, he was placed in a holding cell with the cell door
19 open. An officer then brought him a jail uniform, a white towel,
20 and a mesh bag for his street clothes. Wright sat on a bench in
21 the cell and removed his street clothing, which he placed in the
22 bag. He then proceeded to take a shower as directed, taking the
23 towel with him. He returned to the holding cell with the towel,
24 got dressed in the jail uniform and was escorted to a housing
25 unit. According to Wright, a corrections officer stood in front
26 of him as he removed his street clothes (a process that took one

1 minute) and placed them in the mesh bag provided. When asked in
2 what direction he was facing as he undressed, Wright testified:
3 "At somewhat of an angle to [the officer], but I can't recall 100
4 percent which way I was facing. It was like sort of facing
5 towards the officer." Wright also testified that when he dressed
6 in the holding cell after the shower, no one was present in the
7 holding area. In response to a question relating to the mental
8 and emotional stress allegedly suffered, Wright described his
9 experience as "rather unpleasant" and stated: "[I]t was, you
10 know, just a rather humiliating kind of - shameful kind of, just
11 being naked in front of at least one other individual and
12 possibly in the view of others."

13 Plaintiff Wright's description of the deviations from the
14 clothing exchange protocol is consistent with the deposition
15 testimony of Joseph Kenyon, a corrections officer employed at the
16 Schoharie County Jail. According to Officer Kenyon, inmates are
17 required to stand in front of him and face him during the entire
18 clothing exchange. He watches the inmates as they remove their
19 clothing, the disrobing takes place in the "holding cell where
20 the inmate is at," and there is no option to disrobe in private.

21 III. The Motion for Summary Judgment and the Decision of the
22 District Court

23 Relying upon affidavits as well as depositions and other
24 materials obtained during discovery, the defendants moved for
25 summary judgment in the District Court. They contended that the
26 clothing exchange procedure did not entail a strip search, that

1 inmates were allowed to preserve their privacy in various ways
2 during the exchange, and that established Jail policy permits a
3 strip search only on reasonable suspicion. Defendants also
4 raised the defense of qualified immunity in the motion.
5 Plaintiffs responded that the clothing exchange process requires
6 a visual examination of each inmate during disrobing and that
7 such examination constitutes an unreasonable search for Fourth
8 Amendment purposes when conducted without reasonable suspicion.

9 In a written opinion denying the motion for summary
10 judgment,¹ the District Court stated as follows:

11 Defendants have not met their burden to prove that
12 there is no issue of material fact as to whether [the
13 jail's] policies and practices require COs to observe
14 inmates as they remove their street clothes. However,
15 a question remains: if a CO w[ere] required to observe
16 an inmate undress, would this procedure constitute an
17 unreasonable search under the Fourth Amendment to the
18 United States Constitution?

19 Kelsey, 2007 WL 603406, at *5.

20 Consistently characterizing the clothing exchange as the
21 "Exchange/Strip Search Process" throughout its opinion, the
22 District Court examined the record and concluded that the
23 observation of a newly admitted inmate in the process of
24 disrobing is a search for contraband. Id. at *6. The District
25 Court also noted the defendants' contention that the presence of
26 a corrections officer serves as a deterrent to the transfer or
27 destruction of contraband. Id. at *6. The District Court

1 ¹ In the same opinion, the District Court granted
2 plaintiff's motion for class certification. Kelsey, 2007 WL
3 603406, at *14.

1 concluded: "If this admission is accurate, it can mean only one
 2 thing: that the exchange/strip search process is meant to serve
 3 as a search for contraband - even when there is no reasonable
 4 suspicion to do so." Id. at *7. As the District Court correctly
 5 noted, a strip search without reasonable suspicion is prohibited
 6 by our precedent. However, the court made no final pronouncement
 7 on the constitutionality of the search it had identified:

8 "[T]his Court cannot grant summary judgment to the Defendants
 9 while there is credible conflicting evidence in the record
 10 regarding the nature of the CO's observation of inmates as they
 11 disrobe." Id. The District Court thus did not find that the
 12 challenged searches were unreasonable. The court did find,
 13 however, that the defendants were amenable to suit individually
 14 "[a]s a consequence of their involvement in the maintenance of
 15 [the jail's] policies and practices." Id. Finally, the court
 16 briefly addressed the qualified immunity defense as follows:

17 There remains a dispute regarding material facts
 18 related to the constitutionality of the exchange/strip
 19 search process. As a result, it would be premature to
 20 determine whether Defendants Bates and Hazzard are
 21 responsible for violating clearly established
 22 constitutional law or are immune from suit under the
 23 qualified immunity doctrine. Defendants Bates and
 24 Hazzard may renew their defense at the proper time.

25 Id. at *8.

26 ANALYSIS

27 I. Of Appealability and Qualified Immunity

28 It is the District Court's denial of qualified immunity that
 29 permits the defendants to bring this appeal to us as an exception
 30 to the rule of finality. See Mitchell v. Forsyth, 472 U.S. 511,

1 530 (1985) ("[A] district court's denial of a claim of qualified
2 immunity, to the extent that it turns on an issue of law, is an
3 appealable 'final decision' within the meaning of 28 U.S.C.
4 § 1291 notwithstanding the absence of a final judgment.")
5 Interlocutory appeal in this sort of case "is not permitted if
6 the district court's denial of summary judgment for qualified
7 immunity rests on a finding that there were material facts in
8 dispute." Genas v. N.Y. Dep't of Corr. Servs., 75 F.3d 825, 830
9 (2d Cir. 1996). The Supreme Court teaches that "a district
10 court's summary judgment order that, though entered in a
11 'qualified immunity' case, determines only a question of
12 'evidence sufficiency,' i.e., which facts a party may, or may
13 not, be able to prove at trial . . . is not appealable." Johnson
14 v. Jones, 515 U.S. 304, 313 (1995).

15 Despite the bar to appealability that factual issues may
16 provide in the qualified immunity context, we have observed that
17 as long as the defendant can support an immunity
18 defense on stipulated facts, facts accepted for
19 purposes of the appeal, or the plaintiff's version of
20 the facts that the district court deemed available for
21 jury resolution, an interlocutory appeal is available
22 to assert that an immunity defense is established as a
23 matter of law.

24 Salim v. Proulx, 93 F.3d 86, 90 (2d Cir. 1996). We accept the
25 plaintiffs' version of the facts in making our determination
26 herein, as will be seen. Accordingly, we take jurisdiction over
27 the district court's denial of defendants' motion for summary
28 judgment to the extent that the motion is grounded in qualified
29 immunity, and our review is de novo. See Jones v. Parmley, 465

1 F.3d 46, 55 (2d Cir. 2006).

2 Under the doctrine of qualified immunity, "government
3 officials performing discretionary functions generally are
4 shielded from liability for civil damages insofar as their
5 conduct does not violate clearly established statutory or
6 constitutional rights of which a reasonable person would have
7 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In
8 assessing an officer's eligibility for the shield, "the
9 appropriate question is the objective inquiry whether a
10 reasonable officer could have believed that [his actions were]
11 lawful, in light of clearly established law and the information
12 the officer[] possessed." Wilson v. Layne, 526 U.S. 603, 615
13 (1999). Qualified immunity is also said to protect the
14 government officer "if it was 'objectively reasonable' for him to
15 believe that his actions were lawful at the time of the
16 challenged act." Lennon v. Miller, 66 F.3d 416, 420 (2d Cir.
17 1995) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987));
18 see also Martinez v. Simonetti, 202 F.3d 625, 633-34 (2d Cir.
19 2000).

20 II. Of the Threshold Inquiry

21 Until the issuance of the Supreme Court's opinion in Pearson
22 v. Callahan, 129 S. Ct. 808 (2009), the following threshold
23 inquiry was mandatory:

24 A court required to rule upon the qualified
25 immunity issue must consider, then, this threshold
26 question: Taken in the light most favorable to the
27 party asserting the inquiry, do the facts alleged show
28 the officers' conduct violated a constitutional right.
29 This must be the initial inquiry.

1
2 If no constitutional right would have been
3 violated were the allegations established, there is no
4 necessity for further inquiries concerning qualified
5 immunity.

6 Saucier v. Katz, 533 U.S. 194, 201 (2001). While it is now true
7 "that the Saucier protocol should not be regarded as mandatory in
8 all cases, [the Supreme Court] continue[s] to recognize that it
9 is often beneficial." Pearson, 129 S. Ct. at 818. Accordingly,
10 we are no longer required to make a "threshold inquiry" as to the
11 violation of a constitutional right in a qualified immunity
12 context, but we are free to do so. Id. at 821. The inquiry is
13 said to be appropriate in those cases where "discussion of why
14 the relevant facts do not violate clearly established law may
15 make it apparent that in fact the relevant facts do not make out
16 a constitutional violation at all." Id. at 818. This is such a
17 case. The Supreme Court's current teaching is that "the Saucier
18 Court was certainly correct in noting that the two-step procedure
19 promotes the development of constitutional precedent and is
20 especially valuable with respect to questions that do not
21 frequently arise in cases in which a qualified immunity defense
22 is unavailable." Id.

23 The development of constitutional precedent is especially
24 important here, where (1) this Court has not spoken on the issue
25 of the constitutionality of clothing exchange procedures in jails
26 although the issue has been presented in district courts in this
27 circuit, see, e.g., Marriott v. County of Montgomery, 227 F.R.D.

1 159, 169-70 (N.D.N.Y. 2005) (holding that a jail facility's
2 "change-out" procedure was a "strip search" and in violation of
3 the Fourth Amendment to the Constitution); see also Williams v.
4 County of Niagara, No. 06-CV-291A, 2008 WL 4501918, at *2
5 (W.D.N.Y. Sept. 29, 2008) (involving a class action certification
6 question where the defendants argued, inter alia, that a
7 "'clothing change-out'" procedure in a jail "does not constitute
8 a strip search and is constitutional"); and (2) the
9 constitutionality of clothing exchange procedures in jails may
10 never be developed if this Court were to dispose of all
11 challenges relating to the procedures simply because the
12 procedure is not "clearly established" as a "strip search"
13 violative of the Fourth Amendment.

14 It is also said that addressing the constitutional issue
15 first may not only avoid the possibility of drawn-out litigation
16 and the imposition of unwarranted liability, but may also serve
17 to clarify official conduct standards. See Sound Aircraft
18 Servs., Inc. v. Town of E. Hampton, 192 F.3d 329, 334 (2d Cir.
19 1999). We think that all these purposes are served by
20 undertaking the constitutional inquiry first in this case. When
21 the facts, viewed in light most favorable to the plaintiff, do
22 not demonstrate that an officer's conduct violated a
23 constitutional right, the court need not further pursue the
24 qualified immunity inquiry, "and the officer is entitled to
25 summary judgment." Gilles v. Repicky, 511 F.3d 239, 244 (2d Cir.
26 2007).

1 III. Of Strip Searches and the Fourth Amendment

2 In undertaking our threshold constitutional inquiry, we
3 first take note of our long-standing precedent covering strip
4 searches of those arrested for misdemeanors:

5 The Fourth Amendment requires an individualized
6 "reasonable suspicion that [a misdemeanor] arrestee is
7 concealing weapons or other contraband based on the
8 crime charged, the particular characteristics of the
9 arrestee and/or the circumstances of the arrest" before
10 [he] may be lawfully subjected to a strip search.

11 Hartline v. Gallo, 546 F.3d 95, 100 (2d Cir. 2008) (citing Weber
12 v. Dell, 804 F.2d 796, 802 (2d Cir. 1986)) (first alteration in
13 original); see also Walsh v. Franco, 849 F.2d 66, 68-69 (2d Cir.
14 1988). The written policy of the Schoharie County Jail tracks
15 the language of our precedent by providing that a strip search
16 may be conducted only "[w]here an officer has made a
17 determination that there is reasonable suspicion to believe that
18 the inmate should be searched" or "[w]here an officer has
19 reasonable suspicion to believe an inmate is hiding contraband on
20 his person and/or the inmate is in possession of contraband."
21 There is to be no touching of the body unless the inmate fails to
22 "cooperate" in the search. A much higher standard is required
23 for body cavity searches: "[c]ompelling reasons to believe that .
24 . . contraband . . . constitut[ing] a clear threat to the safety
25 and security of the facility" is concealed in a body cavity. The
26 version of events at the Schoharie County Jail described by the
27 plaintiffs do not describe a body cavity search, and Sheriff
28 Bates has indicated that no such searches have been conducted at
29 the jail during his tenure as Sheriff.

1 Various terms are used to describe the inspection of a naked
 2 body, and the terms are distinguished by the degrees of intrusion
 3 involved in the search for contraband. The term "strip search"
 4 is used generally to describe any inspection of the naked body.
 5 See N.G. v. Connecticut, 382 F.3d 225, 228 n.4 (2d Cir. 2007).
 6 An individual being strip searched may be required to move his
 7 body in various ways to permit a more complete inspection. Id.
 8 A "visual body-cavity search" is a strip search that entails the
 9 specific examination of the genitals and anus, without any bodily
 10 contact by the inspector. Id. Finally, a "manual body-cavity
 11 search" is a strip search that involves a naked body examination,
 12 including a viewing of the genitals and anus, by touching or
 13 probing with an instrument. Id.

14 IV. Of the Clothing Exchange at the Schoharie County Jail

15 For purposes of this appeal, we accept the plaintiffs'
 16 description of the clothing exchange procedure, although the
 17 procedure they describe appears to deviate in certain respects
 18 from the protocol purportedly established by the defendants.²
 19 See Salim, 93 F.3d at 90. We therefore proceed, taking the facts

² Although the dissent, in several places, accuses us of having accepted the defendants' version of the facts, that is not so. Most of the half dozen plaintiffs' "facts" that the dissent claims we ignore are expressly considered in this opinion, as the reader can confirm. Moreover, the third "fact" identified by the dissent — that Kelsey had to walk naked to obtain his prison uniform — is a distortion of the record. Kelsey testified that he "reached over" and "grabbed the . . . uniform," not that he "walk[ed] while naked to obtain the uniform." It is undisputed that the plaintiffs were not entirely deprived of the means for protecting their modesty.

1 in the light most favorable to plaintiffs, to examine the
2 constitutional question presented. See Pearson, 129 S. Ct. at
3 818.

4 We first observe that the plaintiffs make no claim that they
5 were subjected to visual or manual body cavity searches.
6 Plaintiff Kelsey testified that a corrections officer stood in
7 front of him during the brief period when he removed his street
8 clothes and put on the jail uniform. Kelsey testified that he
9 "assume[d]" that the officer "saw [his] genitals" during that
10 time. Kelsey was not asked to manipulate his body in any way or
11 to assume any particular position. Nor was he prevented from
12 protecting his privacy by turning away from the officer as he
13 undressed, by concealing the lower half of his body behind the
14 half-wall in front of which he was standing, or by using the
15 towel that was available to him during the clothing exchange. In
16 any event, briefly "seeing" a man's genitals during a clothing
17 exchange does not amount to a strip search.³

18 Plaintiff Wright's characterization of the clothing exchange
19 as a search is even more attenuated. According to Wright, the

³ The dissent argues that "any statement by the majority about the constitutionality of forcing arrestees to strip is dicta." This ignores the entire basis of this lawsuit, which attacks a policy that (on plaintiffs' version of the facts) compels arrestees to remove all of their clothing in the presence of a watchful officer in preparation for showering and changing into prison attire. We assume, as we must, that inmates are required to remove their clothing in the presence of an officer. We nonetheless hold that the clothing exchange process, as described by plaintiffs, was not an unreasonable search under the Fourth Amendment.

1 clothing exchange took place in a holding cell, where he disrobed
2 in one minute as a corrections officer stood in front of him.
3 Wright testified that he undressed "[a]t somewhat of an angle" to
4 the officer but could not "recall 100 percent which way [he] was
5 facing." As best he could describe it, "[it] was like sort of
6 facing toward the officer." Apparently, a towel was available to
7 him as he disrobed, and he took the towel with him as he went to
8 take a shower before returning to the holding cell with the
9 towel. Back in the cell, he dressed in the jail uniform.
10 According to Wright's version of events, no officer was present
11 when he put on the jail uniform. Also, as with Kelsey, Wright
12 was not required to move or display his body in any particular
13 way.

14 Corrections Officer Kenyon, who supported the testimony of
15 plaintiff Wright, at least to the extent of indicating that the
16 clothing exchange took place in a holding cell (rather than
17 behind the half-wall), declared that "the purpose of the clothing
18 exchange process, as far as I know, is simply to get inmates into
19 the jail uniform and secure their street clothing."⁴
20 Nevertheless, a necessary function of any corrections officer is
21 to observe inmates at all times, whether the inmate is eating,
22 sleeping, showering, undertaking recreational activity or

⁴ Contrary to the dissent's reading of our opinion, this does not suggest that the subjective intent of the corrections officers is to be considered. It supports only the fact that the corrections officers were charged with effectuating a clothing exchange.

1 engaging in any other activity within the confines of any jail.

2 We conclude that the incidental observation of the body of
3 an arrestee during a required clothing exchange, in the manner
4 described by plaintiffs, is not an unreasonable search under the
5 Fourth Amendment. Moreover, it seems to us that a clothing
6 exchange observed by corrections officers under the circumstances
7 described by plaintiffs is related to "maintaining institutional
8 security and preserving internal order and discipline[,]
9 essential goals that may require limitation or retraction of the
10 retained constitutional rights of both convicted prisoners and
11 pretrial detainees." Bell v. Wolfish, 441 U.S. 520, 546 (1979).
12 The objectives served by a clothing exchange, according to
13 Sheriff Bates, include assurance that each inmate has clothing
14 that is clean and free of infestation; that inmates are clearly
15 identifiable and distinguishable from visitors, staff and members
16 of the public; and that a positive state of mind be instilled in
17 each inmate.

18 In assessing the need to promote the foregoing interests, we
19 recognize that we owe "substantial deference to the professional
20 judgment of prison administrators" such as Sheriff Bates. See
21 Overton v. Bazzetta, 539 U.S. 126, 132 (2003). A clothing
22 exchange is a common practice in jails and prisons as is the need
23 for corrections officers to be vigilant at all times. See, e.g.,
24 Marriott, 227 F.R.D. at 169-70; Williams, 2008 WL 4501918, at *2;
25 see also Barber v. Overton, 496 F.3d 449, 463 (6th Cir. 2007)
26 (Cook, J., concurring) ("Corrections officers must be ever

1 vigilant of constant, and often innovative, threats to their
2 safety" (citation omitted)). "Legitimate goals and
3 policies of the penal institution" support clothing exchanges at
4 jail intakes as well as the watchful gaze of corrections officers
5 over inmates, whether they are clothed or not.⁵ Bell, 441 U.S.
6 at 546.

7 The dissent points out that inmates are afforded privacy
8 when they shower and change into prison attire during the
9 clothing exchange process. From this the dissent infers that
10 defendants have "rejected" the idea that the presence of officers
11 when inmates remove their street clothes furthers security,
12 order, and discipline in the jail. This inference is strained at
13 best; and in any event, it is not for us to decide when officers
14 should be permitted to observe inmates as they go about
15 activities of daily life in jail, or specify (under the
16 Constitution) times when inmates may not be watched. As the
17 dissent observes, the Schoharie County Jail is a "controlled
18 environment," in which inmates have a limited expectation of
19 privacy and freedom of movement. While we have an obligation to
20 set a floor of constitutionality permissible conduct, we are ill-
21 equipped to define the contours of life in jail.

22 The District Court framed the issue thus: "[I]f a CO w[ere]

⁵ The dissent contends that our consideration of penological interests is inconsistent with our holding that the clothing exchange procedure did not constitute a Fourth Amendment search. However, that a court must examine penological interests if a constitutional right is implicated does not mean that a court is precluded from considering them in other circumstances.

1 required to observe an inmate undress, would this procedure
2 constitute an unreasonable search under the Fourth Amendment to
3 the United States Constitution?" Kelsey, 2007 WL 603406, at *5.
4 Our answer to this question is that such a procedure is not per
5 se an unreasonable search violative of the Fourth Amendment. In
6 giving this answer, we do not depart from, or erode in anyway,
7 our "clearly established" precedent "that persons charged with a
8 misdemeanor and remanded to a local correctional facility . . .
9 have a right to be free of a strip search absent reasonable
10 suspicion that they are carrying contraband or weapons"
11 Shain v. Ellison, 273 F.3d 56, 66 (2d Cir. 2001); see also N.G.
12 v. Connecticut, 382 F.3d 225 (2d Cir. 2004) (stating that this
13 Court has ruled in several decisions that "strip searches may not
14 be performed upon adults confined after arrest for misdemeanors,
15 in the absence of reasonable suspicion concerning possession of
16 contraband" (citing Shain, 272 F.3d at 62-66; Wachtler v. County
17 of Herkimer, 35 F.3d 77, 81 (2d Cir. 1994); Walsh v. Franco, 849
18 F.2d 66, 68-69 (2d Cir. 1988); Weber, 804 F.2d at 802)). Our
19 precedents do not control the allegations in this case.

20 We hold here only that a process for the exchange of
21 personal clothing for prison clothing under the observation of a
22 corrections officer in the manner described by plaintiffs does
23 not implicate the type of privacy protected by the Fourth
24 Amendment nor does it fall within the prohibitions established by
25 our precedents relating to strip searches. Plaintiffs were not
26 required to display or manipulate their body parts in any way.

1 Moreover, Plaintiffs did not deny that methods were available to
2 them to protect viewing of their private parts in the event they
3 desired to make use of such methods.

4 V. Conclusion

5 Because the plaintiffs have been unable to identify any
6 constitutional violation on the parts of the individual
7 defendants, the Decision and Order of the District Court is
8 reversed, and the case is remanded with instructions to dismiss
9 the action as against the individual defendants. Because the
10 plaintiffs lack any underlying claim of a deprivation of a
11 constitutional right, the claim of municipal liability on the
12 part of defendant County of Schoharie is to be dismissed as well.
13 See Zahra v. Town of Southold, 48 F.3d 674, 685 (2d Cir. 1995).