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. 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.	**No. 3:09-cv-0758**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Defendants have acknowledged that they strip search and "delouse" all detainees admitted to the custody of the West Virginia Regional Jail Authority ("WVRJA"), including the proposed class representative in this case, Michael Cantley. This admission is contained in their motion papers, as well as the WVRJA written policies regarding strip searches. The procedures employed by the WVRJA could not be more humiliating. All detainees are required to undress in front of a corrections officer, manipulate their breasts, genitals and buttocks to allow for an examination of their genitals and body cavities, and then have their privates sprayed down with a caustic delousing solution. The strip and visual cavity searches of pre-trial detainees conducted

by WVRJA are done in the absence of any particularized reasonable suspicion to believe that detainees are harboring contraband in their private areas.

WVRJA Corrections Officers, by the Defendants' own admission, do not consider the seriousness or nature of the charges faced by individual detainees before subjecting them to a strip search. Many other these searches occur before a detainee is even arraigned. Amended Complaint, ¶ 31. A legion of federal courts, including the United States Court of Appeals for the Fourth Circuit and the District of Maryland, have held that strip searches of misdemeanor pre-trial detainees are illegal in the absence of reasonable suspicion. *See, Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981); *Jones v. Murphy,* 470 F. Supp.2d 537, 547-48 (D. Md. 2007). In short, forcing someone charged with a minor crime to undergo the indignity of having a stranger visually examine their private areas, including their vagina and/or rectum, is a quintessential example of an unreasonable search under the Fourth Amendment. One appeals court described these searches as being "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983). Over twenty class actions have been successfully prosecuted regarding blanket strip search policies. *See, for example, Wilson v. County of Gloucester,* 256 F.R.D. 479 (D.N.J. 2009); *Williams v. County of Niagara,* 2008 WL 4501918 (W.D.N.Y. September 29, 2008); *Marriott v. County of Montgomery,* 227 F.R.D. 159 (N.D.N.Y. 2005).

Faced with their own admission that WVRJA strip searches and delouses all detainees, including proposed class members, in the absence of reasonable suspicion or individual justification, the Defendants come before this Court, in the absence of any fact discovery, and while ignoring case precedent, and claim that their practices are legal and proper. The

Defendants posit five arguments in support of dismissal: (1) their blanket strip search and delousing policies comport with the Constitution "precisely because the detainees are intermingled" and because jails have a generalized interest in avoiding lice infestations; (2) the circumstances of Mr. Cantley's entry to the Western Regional Jail, and the charges that Mr. Cantley was brought in upon, provided reasonable suspicion to strip search him; (3) Plaintiff failed to exhaust administrative remedies under the Prison Litigation Reform Act; (4) the Eleventh Amendment and the *Will* Doctrine bars Plaintiff's claims against Director Miller in his official capacity; and (5) the doctrine of qualified immunity shields Director Miller from liability in his individual capacity. Many of these arguments ignore the plain language of the Plaintiffs' thorough Amended Complaint, which details that: a) many members of the class are strip searched and deloused before being arraigned; b) Mr. Cantley was admitted to the WVRJA's custody on multiple occasions during the proposed class period for misdemeanor charges, not on just the one occasion where the Defendants proffer documents that have not been the subject of any discovery inquiry; and c) claims regarding illegal strip searches are clearly asserted against Defendant Terry Miller, the Executive Director of the Regional Jail Authority, in his individual capacity. The Defendants remaining arguments conveniently ignore case authority from this and other judicial circuits that undermines their claims regarding dismissal for qualified immunity and under the exhaustion requirements of the PLRA.

The Defendants' Motion to Dismiss this action should be denied, both as a matter of procedure and, more importantly, as a matter of law.

II. FACTUAL BACKGROUND

A. The Defendants' Illegal, Blanket Strip Search and Delousing Policies.

Plaintiff has alleged that the WVRJA and Director Miller have instituted a written and/or *de facto* policy, custom or practice of strip searching and delousing all individuals who enter the custody of the West Virginia Regional Jail System, regardless of the nature of their charged crime and without the presence of reasonable suspicion to believe that the individual was concealing a weapon or contraband. Amended Complaint, ¶ 22. Moreover, the WVRJA and Director Miller have instituted a written and/or *de facto* policy, custom or practice of conducting visual body cavity searches (visual inspection of the vaginal and rectal cavities) on all individuals who enter the custody of the West Virginia Regional Jail System, regardless of the individual characteristics or the nature of their charged crime. Amended Complaint, ¶¶ 23-25.

Plaintiffs have alleged that that the WVRJA and Director Miller have instituted a written and/or *de facto* policy, custom or practice of delousing all individuals who enter the custody of the West Virginia Regional Jail System, regardless of the individual characteristics or the nature of their charged crime. Amended Complaint, ¶ 27. The delousing procedure first entails a detainee completely disrobing in front of a correction officer. *Id.* The correction officer then sprays delousing solution upon a detainee's naked body. *Id.* Finally, the detainee is ordered to shower within full view of the corrections officer. *Id.* The delousing procedure is conducted upon all detainees without inquiry into or establishment of reasonable suspicion, or inquiry or establishment into whether the detainee actually harbors lice. *Id.* The Plaintiff's Amended Complaint also states that many detainees are strip searched and deloused before being arraigned, and that a substantial number of proposed class members are strip searched and deloused only to be released from WVRJA facilities a short time later. Amended Complaint, ¶

31.

Aside from denying physical cavity searches, the Defendants have not denied that they perform blanket strip searches and delousing on all detainees who enter the West Virginia Regional Jail system. *See* Defendants' Brief at 5. Rather, Defendants have attempted to justify their blanket strip search policy on the basis of intermingling: "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." *See* Defendants' Brief at p. 12. The Defendants fail to provide any facts that justify this argument – for instance – detailing to the Court the number of occasions when contraband is actually found, nor have the Plaintiffs had an opportunity to challenge these assertions. *See, Ford v. City of Boston,* 154 F. Supp.2d 131, 134 (D. Mass. 2001) (contraband discovered "five times," or 0.063 percent of the time, during admissions at Suffolk County Jail undermines claims of reasonableness). The Defendants also ignore the well-pled allegations of the Plaintiffs complaint detailing that WVRJA detainees are routinely strip searched and deloused prior to being arraigned before a judge. Amended Complaint, ¶ 31.

The Defendants have failed to proffer any justification whatsoever for their blanket delousing policy other than citing to *Russell v. Richards,* 384 F.3d 444 (7th Cir. 2004), where, unlike here, the defendant adduced evidence of lice infestations in the jail. Plaintiff has had no opportunity to take discovery into the factual justification, if any, to substantiate the Defendants' need to conduct blanket strip searches and delousing on new pretrial detainees.

B. Facts Relevant to the Named Plaintiff Michael Cantley.

Contrary to the factual recitation put forward by the Defendants, Plaintiff Michael Cantley has been admitted to the custody of the WVRJA on multiple occasions during the proposed class period for misdemeanor charges. Mr. Cantley alleges that the charges brought against him did not support a claim that he "possessed weapons or contraband in private areas." Amended Complaint, ¶ 43. Defendants, in turn, contend that the charges brought against Mr. Cantley – on one occasion -- were indicative of violence, thus providing reasonable suspicion to strip search him. *See* Defendants' Brief at 15-16. Defendants further submit three documents from the Western Regional Jail, which they contend show that Plaintiff was hostile and belligerent upon his entry of the jail, thus providing reasonable suspicion for his strip search. *See id*. and Exhibits A-C thereto. Plaintiff's counsel has not had opportunity to take any discovery into the circumstances of Mr. Cantley's multiple entries into the WVRJA facilities, including the instance detailed in the Defendants' motion papers. The Plaintiffs maintain that discovery will demonstrate that the facts posited by the Defendants are nothing but a *post hoc* effort to justify Mr. Cantley being strip searched and deloused under their blanket policy.

III. STANDARD OF REVIEW

A Rule 12(b)(6) motion "should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 128 (4th Cir. 2008) (*quoting Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*,

129 S. Ct. 1937, 1949 (2009) (*quoting Bell Atl. v. Twombly*, 550 U.S. 544, 570, (2007)). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal* at 1950. A claim is facially plausible when the alleged facts "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 1949.

"A district court may not resolve factual disputes on Rule 12(b)(6) motion without converting motion into one for summary judgment under Rule 56." *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009) (*citing Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007).

IV. ARGUMENT

A. The Fourth Circuit Court of Appeals, Along With the Overwhelmingly Majority of Federal Courts, Have Held that Blanket Jail Strip Search Policies are Unconstitutional When Applied to Individuals Charged With Misdemeanors or Other Minor Crimes.

Defendants argue that their uniform strip search policy is Constitutional under the balancing test set forth by the Supreme Court in *Bell v. Wolfish*, as applied by the Fourth Circuit Court of Appeals in *Logan v. Shealy,* 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied sub nom. Clements v. Logan*, 455 U.S. 942, 71 L. Ed. 2d 653, 102 S. Ct. 1435 (1982). Specifically, Defendants contend that their blanket 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." *See* Defendants' Brief at p. 11-12. For this reason, Defendants assert their blanket strip search policy passes muster under *Bell*. This argument, however, is wholly contradicted by *Logan* and the overwhelming majority of case precedent from other judicial circuits, as intermingling alone has never been found to provide sufficient basis to justify a blanket strip search policy. *See, e.g., Masters v. Crouch,* 872 F.2d 1248, 1254 (6th Cir.1989), *cert. denied,* 493 U.S. 977 (1989) (citing to *Logan* and finding that

"the fact of intermingling alone has never been found to justify such a search without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband to the institution"); *Allison v. GEO Group,* 611 F. Supp.2d 433, 460-61 (E.D. Pa. 2009).

The Fourth Amendment protects citizens against unreasonable searches and seizures by the government. In the context of searches incident to criminal detention, the United States Supreme Court held in *Bell v. Wolfish*, 441 U.S. 520 (1979), that:

> [t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559. An examination of one's naked body, especially someone's anus and vagina, clearly constitutes "an invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993). "[F]ew exercises of authority by the state… intrude on a citizen's privacy and dignity as severely as the visual anal and genital searches practiced here." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983).

In addressing the propriety of blanket strip search policies, the Fourth Circuit has held that an "indiscriminate strip search policy routinely applied to detainees such as [the misdemeanant plaintiff] along with all other detainees cannot be constitutionally justified simply on the basis of administrative ease in attending to security considerations." *Logan*, 660 F.2d at

1013.[1] In *Logan*, the plaintiff was arrested for driving while intoxicated and ordered to be held for four hours or until released to a responsible person. *Id.* She was taken to a holding area and subjected to a visual strip search. *Id.* In reversing a directed verdict for the defendants the court of appeals found that the search was unrelated to any discernible security needs and could not reasonably be thought justified when balanced against the nature of the intrusion. *Id*. *See also, Abshire v. Walls,* 830 F.2d 1277, 1279-80 (4th Cir. 1987) (strip search of pre-trial detainee ruled unconstitutional, "the standard in this circuit for judging the constitutionality of a strip search of a pre-trial detainee is firmly established"). The Fourth Circuit listed four factors that led to its conclusion in *Logan*: (1) the plaintiff would not be intermingled with the general jail population; (2) the offense, although not a minor traffic violation, was not one usually associated with the possession of weapons or contraband; (3) there was no cause to believe that this particular detainee might possess either; and (4) when the search was conducted the plaintiff had been at the detention center for one and one-half hours without even a pat down. *Id.* District Courts within the Fourth Circuit have also addressed blanket strip search policies, and have uniformly found them to be unconstitutional. *See Jones v. Murphy*, 470 F. Supp. 2d 537, 547-548 (D. Md. 2007) (citing *Logan*, 660 F.2d at 1013-14 (explaining that "[a]n indiscriminate strip search policy routinely applied to detainees [whose underlying offense is unlikely to involve weapons or contraband] cannot be constitutionally justified . . ."); *see also Smith v. Montgomery County*, 643

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[1] Further, the overwhelming majority of Circuit Courts, when considering the balancing test required by *Bell*, have likewise held that strip searches cannot be utilized against individuals charged with, but not convicted of, minor crimes (misdemeanors, summary offenses, arrests on bench warrants, etc.) in the absence of reasonable suspicion to believe a detainee is in possession of a weapon or contraband. *See Wood v. Hancock County Sheriff's Dep't.*, 354 F.3d 57, 62 (1st Cir. 2003); *Weber v. Dell*, 804 F.2d 796, 801 (2d Cir. 1986); *Stewart v. Lubbock County*, 767 F.2d 153, 156-57 (5th Cir. 1985); *Masters v. Crouch*, 872 F.2d 1248, 1253 (6th Cir.), *cert. denied*, 493 U.S. 977 (1989); *Mary Beth G*., 723 F.2d at 1273; *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993). This is because "[r]equiring particularized reasonable suspicion to strip search misdemeanant arrestees balances institutional security needs with individual privacy, which includes a reasonable expectation not to be unclothed involuntarily, to be observed unclothed or to have one's private parts observed or touched by others." *Wood*, 354 F.3d at 62 (internal quotation marks omitted).

F. Supp. 435, 439-43 (D. Md. 1986) (holding that strip searching "all felony arrestees, and all temporary detainees arrested for misdemeanor offenses that involve weapons or contraband" was constitutional but explaining that blanket strip search policy regardless of underlying offense was unconstitutional).

Moreover, Defendants' reliance upon "intermingling" with the general prison population is unavailing as a justification for blanket strip searches. As detailed above, the Fourth Circuit in *Logan* cited to a total of *four* factors in determining that the blanket strip searches at issue were unconstitutional, including two factors that Defendants ignore in their brief: whether a detainee's offense was commonly associated by its very nature with the possession of weapons or contraband and whether there cause in a detainee's specific case to believe that he or she might possess weapons or contraband. *Logan*, 660 F.2d at 1013. The *Logan* court then held that blanket strip searches could not be based on "administrative ease in attending to security considerations." *Id.* Thus, *Logan* directly contravenes the Defendants' proffered justification for the blanket strip searches here: that they "are performed precisely because the detainees are intermingled." Defendants' Brief at 11-12. Instead, the Court in *Logan* applied the balancing test required by *Bell* after having full information about the searches in question. Looking to one factor from *Logan* is both unfair and a mischaracterization of the Fourth Circuit's holding. This is especially true given that the Plaintiffs' complaint alleges that many members of the proposed class were strip search before being arraigned, which would directly undermine concerns about commingling because many detainees would presumably then be released. Other courts, incidentally, have reached the same conclusion in finding intermingling alone lacking as a justification for blanket strip searches. *See Masters,* 872 F.2d at 1254 (citing to *Logan* and finding that "intermingling alone" has never been found to justify blanket strip searches); *see*

also Roberts v. State of Rhode Island, 239 F.3d 107, 112-113 (1st Cir. 2001) ("the deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration"); *Walsh v. Franco*, 849 F.2d 66, 68 (2nd Cir. 1988) (blanket strip searching is not acceptable merely because intermingling existed); *Young v. County of Cook*, 616 F. Supp. 2d 834, 848 (N.D. Ill. 2009) ("though intermingling with general prisoners may be one factor in evaluating the reasonableness of a strip search policy, that fact standing alone is not enough to justify strip searches in the absence of individualized reasonable suspicion") (cited in Defendants' brief); *Allison v. GEO Group, Inc.*, 611 F. Supp. 2d 433, 460-61 (E.D. Pa. 2009) (citations omitted) ("the Court is not influenced by the fact that some persons do anticipate their own arrests and might have the opportunity to conceal contraband. . . Such circumstances do not justify an otherwise unreasonable blanket policy.") (cited by Defendants' brief); *Newkirk v. Sheers*, 834 F. Supp. 772, 789-90 (E.D. Pa. 1993) (rejecting defendants' argument that the strip searches of non-violent protestors pursuant to a blanket policy was reasonable because persons "'who commit actions intending or expecting to go to prison'" threaten institutional security); *John Does 1-100 v. Boyd,* 613 F. Supp. 1514, 1524 (D. Minn. 1985) ("[T]he commingling of detainees does not mandate a finding that the defendants' strip search policy is constitutional … any danger associated with commingling is minimized by the fact that a detainee's arrest is an unplanned event. The danger of smuggling is therefore wholly unsubstantiated. Further, methods can be devised by defendants to minimize commingling"). The Plaintiffs should be given an opportunity to take discovery on the WVRJA's justification for its strip search and delousing policies before a decision is rendered on the merits.

Finally, the other cases that Defendants rely upon are unavailing. Defendants' reliance upon *Turner v. Safely*, 482 U.S. 78 (1987) and *Hudson v. Palmer,* 468 U.S. 517 (1984), and other

similar prison regulation cases, is entirely misplaced. These decisions address the rights of incarcerated, convicted individuals, not pretrial detainees. Both *Turner* and *Hudson* cited to the *Bell* decision with approval, and neither set aside *Bell's* balancing test regarding strip searches. *See, Allison v. GEO Group,* 611 F. Supp.2d 433, 444-48 (E.D. Pa. 2009); *Foote v. Spiegel,* 995 F. Supp. 1347, 1359, n. 2 (D. Utah 1998) ("Because the Fourth Amendment test is already one of reasonableness under the circumstances, the court finds that the *Bell* factors, formulated specifically for use in the Fourth Amendment context, are more appropriate for use in this [blanket strip search case] than the factors promulgated in *Turner*.") One circuit has expressly held that *Turner* does not apply to local correctional facilities, *see, Shain v. Ellison,* 273 F.3d 56, 65-66 (2d Cir. 2001), while another has found that, in the context of strip searches, the *Turner* factors must still be balanced by the reasonableness requirements of *Bell. See, Jordan v. Gardner,* 986 F.2d 1521, 1540 (9th Cir. 1993) (*en banc*). This Court, when previously analyzing a strip search claim brought by an inmate housed in a high security area of a state prison – a situation far removed from that considered here – also held that the reasonableness test in *Bell* "is more appropriate to the specific question whether [visual body cavity] searches violate the Fourth Amendment." *Skundor v. McBride,* 280 F. Supp.2d 524, 526, n. 2 (S.D.W.Va. 2003). The Defendants have not come forward with one case, from any jurisdiction, that holds that *Bell's* reasonableness requirement, as applied to strip searches, is in any way limited by prison regulation cases.

In sum, because Defendants' blanket strip search policy violates the Fourth Amendment's prohibition on unreasonable searches as interpreted by the Fourth Circuit in *Logan*, Defendants' motion to dismiss should be denied.

B. Defendants' Delousing Policy Is An Unreasonable Search That Violates Plaintiff's Right To Privacy Protected By The Fourth Amendment And Other Constitutional Underpinnings.

Defendants argue that their delousing procedure is permissible because it takes place concomitantly with their blanket strip search procedure, which they contend to be permissible. But for the same reasons that Defendants' blanket strip search procedure fails muster under the Constitution, so too does Defendants' delousing procedure. Further, Defendants' delousing procedure is an even more intrusive search and invasion of privacy than a visual cavity search because it involves the involuntary spraying of delousing solution upon detainees' naked bodies, including their genitals, regardless of whether a detainee is actually harboring lice. *See* Amended Complaint, ¶ 27. The Defendants have proffered almost no cogent argument to the Court to justify this delousing procedure, other than relying on one easily distinguishable case.

Defendants cite to *Russell v. Richards*, 384 F.3d 444 (7th Cir. 2004), as the "closest a Court has come to considering" the issue of whether a blanket delousing policy comports with the Constitution. To the contrary, at least three other District Courts have considered blanket delousing policies where naked detainees are sprayed down with anti-lice solution like Defendants' policy here. One of these courts condemned the delousing policy as unconstitutional, and the other two certified classes relating to the issue of blanket delousing, without yet passing judgment on liability. *See, Doan v. Watson*, 168 F. Supp. 2d 932, 937 (S.D. Ind. 2001) (holding that the blanket, naked, spraying-down "delousing procedure administered by Defendants in the Floyd County Jail violates the Fourth Amendment's prohibition of unreasonable searches" and granting summary judgment for the plaintiffs); *Wilson v. County of Gloucester*, 256 F.R.D. 479, 486 (D.N.J. 2009) (finding that "Plaintiffs have put forth a legitimate question of law common to all proposed class members: whether requiring all newly

admitted pretrial detainees to completely disrobe before a corrections officer-- either during a supervised shower or application of delousing spray-- violates federal or state law."); *Gwiazdowski v. County of Chester,* 2009 WL 3448121, *6 (E.D. Pa., October 20, 2009) ("Defendant's delousing policy specifically requires a visual inspection of the naked body to inspect for wounds and sores, and therefore is considered a strip search"). The Plaintiffs also respectfully suggest that the WVRJA's delousing policy goes beyond violating Cantley's rights and the rights of putative class members under the Fourth Amendment, and also violates their constitutional right to privacy. *See, Griswold v. Connecticut,* 381 U.S. 479, 485 (1965) (recognizing the "penumbral rights of privacy and repose"); *Canady v. Boardman,* 16 F.3d 183, 185 (7th Cir. 1994) ("[O]ne of the clearest forms of degradation in Western Society is to strip a person of his clothes, The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy"). Thus, there is ample authority for the Court to find that Defendants' delousing policy is unconstitutional.

Further, the delousing procedure employed by Defendants here markedly differs from policy at issue in *Russell*, which was described by the court as follows:

> Before entering the general population of the Johnson County jail, each incoming inmate is handed a small cup of Liceall brand delousing shampoo and is told to apply it to his scalp and rinse it out while showering. No one at the jail monitors the inmate to verify that he has used the shampoo as instructed, however. In fact, as far as the jail is concerned, any inmate may refuse to apply the shampoo, although inmates are not told that they have this right.

Russell, 384 F.3d at 446 (emphasis added).

In addition to the fact that *Russell* concerned a claim under the Fourteenth Amendment for unwanted medical treatment, rather than the Fourth Amendment claims at issue here, there was no allegation in *Russell* that the detainees were forced to disrobe in front of a corrections officer. Second, unlike in *Russell*, Plaintiff and the putative class members here are not merely

handed a small cup of anti-lice shampoo and then left unsupervised to shower, with the apparent option to refuse to apply the shampoo. Rather, Plaintiff and the putative class members were and are sprayed down with anti-lice solution, stand naked for a period of time while being observed "rubbing the solution into their hair, including their pubic hair," and then are ordered to shower within full view of a corrections officer. *See* Amended Complaint, ¶ 27; *see also* Defendants' Brief at 3-4. Finally, unlike the defendant in *Russell*, the Defendants here have failed to adduce any evidence whatsoever that the WVRJA has had lice infestation problems sufficiently severe to justify a blanket delousing policy.[2]

Furthermore, if the Court chooses to analyze the delousing policy under the Fourth Amendment balancing test enunciated in *Bell*, the rights of pre-trial detainees relative to forced delousing are even more compelling that their rights regarding strip searches. The WVRJA's delousing policy involves corrections officers spraying a caustic substance on the genitals, head and buttocks of detainees, making them stand there with this solution on their bodies for a period of time, and then supervising them showering the delousing solution off of their privates, all in the absence of any inspection or determination that an individual is actually infested with lice. It is hard to imagine a more degrading procedure for someone charged with a minor crime, who has likely not even seen a judge, then for them to be deloused like an animal; the justification for this procedure should be highly compelling and grounded in medical necessity. The Plaintiffs will present proof to the Court, after having an opportunity to conduct discovery, to demonstrate that there is no medical justification for requiring the delousing of all detainees absent a finding, made by a medical professional, that a detainee is actually harboring lice. The Plaintiffs will also present proof to the Court that a one-time "Liceall" treatment sprayed on by a Corrections

[2] As detailed elsewhere herein, Plaintiff has had no opportunity to take discovery into the factual justification, if any, to substantiate the Defendants' need to conduct blanket delousing on new pretrial detainees.

Officer, without any effort to remove lice eggs from head or pubic hair, is a largely ineffective treatment for someone infested with lice.

Accordingly, because Defendants' delousing procedure is the same as the delousing procedure at issue in *Doan,* and an order of magnitude more intrusive and invasive than the delousing procedure at issue in *Russell*¸ the court should deny Defendants' motion to dismiss.

C. Whether Defendants Had Reasonable Suspicion to Strip Search Plaintiff Cantley Is Properly the Subject Of a Summary Judgment Motion, Not a Motion to Dismiss

Defendants contend that there was reasonable suspicion to strip search Plaintiff Cantley because of the nature of the offense with which he was charged, and his actions at the jail. Plaintiff disagrees with these contentions and has alleged otherwise. *See* Amended Complaint, ¶¶ 38-43. (alleging that "the allegations against Mr. Cantley did not involve a claim that he had harmed his wife, or anyone else, but rather that he was present in a location at which he was forbidden to be present," and that "Plaintiff Cantley's arrest was void of any reasonable suspicion that he harbored any weapons or contraband").

First and foremost, it is well-settled that a "district court may not resolve factual disputes on Rule 12(b)(6) motion without converting motion into one for summary judgment under Rule 56." *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009) (*citing Bosiger v. U.S. Airways*, 510 F.3d 442, 450 (4th Cir. 2007). Because Plaintiff's counsel have not had opportunity to take any discovery into the circumstances of Mr. Cantley's entry into the Western Regional Jail, Defendants' motion to dismiss should be denied. This is especially true given that Mr. Cantley has been admitted to the WVRJA's custody for misdemeanor charges on several occasions during the class period, Amended Complaint, ¶ 43, not just on the one occasion referenced by the Defendants in their motion papers.

Second, Defendants have not contended that the corrections officer(s) who strip searched

and deloused Mr. Cantley even knew what Mr. Cantley was charged with when he entered the jail. Exhibits A, B and C to the Defendants' motion papers provide no further information on this point, as they appear devoid of any charging information for Mr. Cantley. Because a defendant may not invent a *post hoc* justification for an unconstitutional strip search, Defendants' argument that the nature of Mr. Cantley's alleged offense justified his strip search must fail. *See, Bizzarro v. Ocean County,* 2009 WL 1617887, * 13 (D.N.J. June 9, 2009) ("Defendants cannot create post-hoc rationales to manufacture justifications for conducting strip searches"); *Doe v. Calumet City,* 754 F. Supp. 1211, 1220 (N.D. Ill. 1990) (defendant cannot avoid liability by manufacturing post-hoc basis for strip searches which were conducted pursuant to indiscriminate and routine policy); *Gonzalez v. City of Schenectady,* 141 F. Supp.2d 304, 309 (N.D.N.Y. 2001) (effort to establish reasonable suspicion after admitting blanket strip searches "defies logic and, frankly, is absurd").

Finally, Defendants do not and cannot argue that Mr. Cantley's alleged offense, or his purported belligerence upon entry to the jail, justified the delousing procedure that he underwent. For this reason alone, Defendants' motion to dismiss should be denied.

The Court should not rule upon whether the Defendants had reasonable suspicion to strip search Mr. Cantley until such time that Plaintiff has had opportunity to take discovery in this matter.

D. The Prison Litigation Reform Act's Exhaustion Requirement Is Not A Bar To Plaintiff's Claims.

Defendants argue that the Complaint should be dismissed because Plaintiff has not exhausted his administrative remedies as set forth in the Prison Litigation Reform Act (PLRA). However, the PLRA's exhaustion requirement does not apply to Plaintiff's claims since Plaintiff was not incarcerated at the time that the Complaint was filed. The Western District of North

Carolina has recently held that:

> An inmate who has been released from custody is no longer "incarcerated or detained" as defined in § 1997e(h) and, therefore, does not qualify as a prisoner subject to the exhaustion requirement of the PLRA. *See e.g., Cofield v. Bowser*, 247 Fed. App'x 413, 414 (4th Cir. 2007)] ("Because [the plaintiff] was not a prisoner when he filed his complaint, the PLRA exhaustion requirement is not applicable to his § 1983 action."); *Nerness v. Johnson,* 401 F.3d 874, 876 (8th Cir.2005) ("First, [plaintiff] was not subject to the PLRA's exhaustion requirement because he was not a prisoner or otherwise incarcerated when he filed his complaint ."); *Norton v. City of Marietta*, 432 F.3d 1145, 1150 (10th Cir. 2005),] "[P]laintiff, who was not a prisoner confined in a jail, prison, or other correctional facility when he brought suit, did not have to exhaust his administrative remedies first."); *Ahmed v. Dragovich,* 297 F.3d 201, 210 n. 10 (3d Cir.2002) ("We note that every court of appeals to have considered the issue has held that the PLRA does not apply to actions filed by former prisoners.").

Shembo v. Bailey, 2009 WL 129974, *2 (W.D.N.C. Jan. 20, 2009); *see also Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000); *Grieg v. Goord*, 169 F.3d 165 (2d Cir.1999); *Wilson v. Hampton County*, 2005 WL 2877725, *3 (D.S.C. Oct. 31, 2005) ("the exhaustion-of-remedies requirement in the PLRA does not apply to plaintiffs who file § 1983 actions after being released from prison"). *See also, Kelsey v. County of Schoharie,* 2005 WL 1972557, *3 (N.D.N.Y. August 5, 2005) (refusing to apply the PLRA to a strip search class action). Thus, Defendants' argument with regard to the PLRA is without merit.

E. The Eleventh Amendment And The *Will* Doctrine Do Not Bar Plaintiff's Claims Against Director Miller In His Individual Capacity.

The Defendants next argue that the Plaintiff's claims against Defendant Miller are barred by both 11th Amendment to the United States Constitution and the rule that state officials, acting in their official capacities, are not 'persons' under 42 U.S.C. § 1983. Defendants' Brief at 18 (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 109 (1989)). The law on these issues is so well developed, and the Plaintiff's Complaint so patently clear, that Defendants' argument is little more than unnecessary filler.

Although all of the case authority provided by the Defendants deals only with claims against a state official in their official capacity, rather than their individual capacity, the Defendant apparently seeks a dismissal of all claims. It is unclear whether this is an oversight on the Defendants' part, or if they are being deliberately vague in order to create confusion. The case law is clear that § 1983 suits seeking monetary damages are permissible against state officials in their individual capacities, and the Defendants have not cited a single authority to the contrary. *See Hafer v. Melo*, 502 U.S. 21, 23 (1991). *See also, Roach v. Burke,* 825 F. Supp. 116, 118 (N.D.W.Va. 1993) ("individuals may still be sued in their individual capacities even if the alleged wrongdoing was conducted while in performance of their official capacity"). Furthermore, although claims for monetary damages against state officials in their official capacities, and state agencies, are barred, claims for declaratory and injunctive relief are perfectly appropriate. *Will v. Mich. Dept. of State Police*, 491 U.S. 71, n. 10 (1989); *Davis v. Greene,* 2009 WL 3064106, * 16 (S.D.W.Va., September 18, 2009) ("A state agency is not a "person" within the meaning of 42 U.S.C. § 1983, and can only be sued for injunctive relief"). Ironically, *Will* is the very case which the Defendants relied upon to make their arguments. The Plaintiff conspicuously distinguished the "individual capacity" damages causes of action from the declaratory and injunctive relief causes of action in his Complaint just to forgo unnecessary briefing such as this. Amended Complaint, First and Second Causes of Action, pp. 13-14 (stating claims pled against Director Miller in his "individual capacity"). The Defendants' specious claims in this regard are not a basis for dismissal.

F. Qualified Immunity Does Not Not Bar Plaintiff's Claims Against Director Miller Because Plaintiff's Right to Be Free Of Unreasonable Searches Was Clearly Established, and It Was Not Objectively Reasonable For Director Miller To Believe That A Blanket Strip Search Policy Was Lawful, Especially Given His Position Of Authority.

Defendant Miller further contends that he is entitled to dismissal under the doctrine of qualified immunity, arguing that the "Plaintiff has failed to make any allegation that a particular action of the Defendant Terry L. Miller violated a right, privilege, or immunity secured to the Plaintiff." Defendants' Brief at 19. Other than this terse statement, the Defendants do not even set forth a basis for the application of qualified immunity.

The Defendants correctly observe that "[q]ualified good faith immunity shields a governmental official from liability if the officer's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person in the same position would have known." Defendants' Brief at 18 (citing *Harlow v. Gitzgerald* (sic), 457 U.S. 800, 818 (1982)). However, the Defendants do not proceed to argue that Defendant Miller did not violate the Plaintiff's "clearly established rights." Rather, the Defendants merely seem to argue that the Plaintiff failed to plead facts sufficient to overcome a qualified immunity defense. This argument is unavailing for several reasons, not the least of which is that since qualified immunity is an affirmative defense, it need not be addressed by the Plaintiff in his Complaint.

In *Gomez v. Toledo*, 466 U.S. 635, 635-36, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980), the Supreme Court considered the issue of whether, in an action brought under § 1983 against a public official whose position might entitle him to qualified immunity; a plaintiff must plead allegations in anticipation of the affirmative defense. The *Gomez* Court began its analysis by elucidating the distinction between a plaintiff's cause of action under § 1983 and a claim of qualified immunity:

> [T]wo -- and only two -- allegations are required in order to state a cause of action under [§ 1983]. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

Id. at 640. The Plaintiff's Amended Complaint pleads both of these requirements, almost to the point of redundancy. Specifically, paragraphs 5, 21-37, and 46-52, address these issues in a clear and incontrovertible manner.

The *Gomez* Court observed that neither the language of § 1983 nor its legislative history suggests that a plaintiff has the duty to plead facts relevant to a qualified immunity defense in order to state a claim. *See id.* at 639-40. Qualified immunity, explained the Court, is a defense available to the government official in question, not a part of the plaintiff's cause of action which he must denigrate. *Id.* at 640. Citing to the Federal Rules, the Court stated that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant." *Id.* (citing Fed. R. Civ. P. 8(c) (imposing upon the defendant the burden of pleading any "matter constituting an avoidance or affirmative defense")). The Court concluded that there is "no basis for imposing on the plaintiff an obligation to anticipate such a defense…" *Id*. at 640.

Additionally, as discussed in greater detail earlier in this Brief, the law regarding the unconstitutionality of blanket strip searches of pre-trial misdemeanor detainees was clearly established at the time of the Plaintiff's detention. Indeed, the 4th Circuit itself had already decided this issue as far back as 1981. *Logan*, 660 F.2d 1007 at 1013; *see also Jones*, 470 F. Supp. 2d at 547-548 ("the right of those arrested for offenses not likely to involve weapons or contraband to be free from strip searches without any individualized finding of reasonable suspicion appears to be clearly established.") (*citing Logan*, 660 F.2d at 1013 (strip searching must be reasonable under the circumstances and was not reasonable when done to arrestee whose offense was not likely to involve weapons or contraband); *Amaechi v. West*, 237 F.3d 356, 364

(4th Cir. 2001) ("because West had no reason to believe that Amaechi posed a danger to the officers, and because Amaechi was arrested for a misdemeanor noise violation, West should have known that his search of Amaechi similarly was unjustified and therefore unconstitutional."); *Abshire v. Walls*, 830 F.2d 1277, 1279-80 (4th Cir. 1987) (citing *Logan* and stating "the standard in this circuit for judging the constitutionality of a strip search of a pre-trial detainee is firmly established")). Moreover, and even more specifically, "it seems clear that it was not objectively reasonable for [Director Miller] to believe that a blanket strip search policy was lawful, especially when [his] position of authority is considered." *Jones*, 470 F. Supp. 2d at 547-548 (citing *Logan*, 660 F.2d at 1013-14 (explaining that "[a]n indiscriminate strip search policy routinely applied to detainees [whose underlying offense is unlikely to involve weapons or contraband] cannot be constitutionally justified . . ." and distinguishing the reasonableness of a policy-setting sheriff having believed a policy to be constitutional from that of an implementing deputy).

Finally, as evidenced in other strip search litigation, factual discovery may undermine any qualified immunity defense the Defendant may attempt to raise. Practically speaking, correctional officials generally follow the developing law pertinent to their duties and are usually aware of most seminal decisions. It is quite likely that Defendant Miller was perfectly aware of the numerous legal decisions holding that blanket strip search policies are unconstitutional, yet continued to employ those unconstitutional practices in West Virginia. The Plaintiffs' complaint states as much. Amended Complaint, ¶ 33 (policy promulgated "in bad faith and contrary to clearly established law"). The Defendant further disputes the facts pertinent to the Plaintiff's arrest, detention and subsequent strip search. This alone is sufficient grounds to deny the Motion to Dismiss at this stage. *See Dimeglio v. Haines*, 45 F.3d 790 (4th Cir. 1995) (noting that in cases

where there is a material dispute concerning an alleged violation of clearly-established law, the question of qualified immunity "cannot be resolved without discovery.").

V. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied in its entirety, especially in the absence of appropriate discovery.

Respectfully submitted by:

/s Aaron Rihn

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