UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GREGORY GARVEY, SR., on behalf of himself and on behalf of others similarly situated, Plaintiffs, v. FREDERICK B. MACDONALD and FORBES BYRON, in their individual capacities, Defendants.	Civil Action No. 07-30049

MEMORANDUM IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NOW COME the Defendants, Frederick B. Macdonald and Forbes Byron, and submit their Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment.

PRELIMINARY STATEMENT

Defendants are seeking Summary Judgment to enter in their favor pursuant to Fed.R.Civ.P. 56, and request that the Plaintiff's Motion for Summary Judgment be denied. Defendants claim that the archaic conditions in existence at the Franklin County Jail ("Jail") during the class action period, including its layout and age along with other factors, made it legal to strip-search class members, and argue:

1. The strip search policy was reasonable under Bell v. Wolfish and its

progeny.

2. The factors enunciated in Gilanian v. City of Boston provide a compelling reason for a blanket strip search policy.

3. The absolute defense of qualified immunity bars an action against the Defendants due to the archaic nature of the Franklin County Jail.

The Plaintiff claims that the Defendants' blanket strip search policy at the Jail from March 28, 2004, through February 24, 2007, which was changed to a "reasonable suspicion" standard when the new Franklin County House of Corrections ("HOC") opened, violates the Fourth Amendment. The Defendants argue that the archaic nature of the Jail, which was built in 1886 and was replaced by the HOC in 2007, presented unusual institutional security issues and facilitated the entry of contraband into the facility, and therefore the policy of strip searching all pre-arraignment detainees upon admission was necessary and constitutionally permissible. These unique security concerns at the old Jail created a compelling reason for the adoption of a policy which allowed for strip searches without the need for reasonable suspicion.

FACTS

The Franklin County Jail was built in 1866. *Defendants' Local Rule 56.1 Statement ("Defendants' Statement"), ¶ 1.* It was originally built to house 66 prisoners but, together with a modular addition, eventually housed up to 188. *Id., ¶ 1.* The Jail was built in the older "linear" style (cells lining corridors offering only indirect surveillance); the new HOC was built in the modern "pod" style (two tiers of cells positioned within the perimeter of a

common dayroom, which allows direct supervision of all cells). *Id.*, ¶ *5.* The cells in the Jail were 48 square feet, compared to 80 square feet at the new HOC. *Id.*, ¶ *6.* The Jail was used by most of the police departments in Franklin County to hold pre-arraignment detainees pursuant to G.L. c. 126, s. 4, as most local police departments in this rural county had no specific facilities for holding these individuals. *Id.*, ¶ *13.* The Jail held a wide variety of prisoners, including those who were already sentenced (including convicted felons), federal prisoners, those awaiting trial, pre-arraignment detainees, and those held in protective custody. *Id.*, ¶ *4.* The Jail also served as a house of correction, and thus housed convicted felons serving their sentences. *Id.*, ¶ *4.* As a result of institutional security issues caused by the archaic nature of the Jail, the sheriff adopted a blanket strip search policy for all pre-arraignment detainees. *Id.*, ¶ *14.* The policy was intended to protect the safety of both the inmates and the correctional officers. *Id.*, ¶ *14.* The strip search policy was changed to a "reasonable suspicion" standard when the new HOC opened, as the new facility solved the institutional security issues that existed at the old Jail. *Id.*, ¶ *20.*

In 1999, the policy was changed from a blanket strip search policy to a "reasonable suspicion" standard. *Id.*, ¶ *15.* The policy was changed after the sheriff attended a monthly Massachusetts sheriffs' meeting, and the concern regarding the policy was due to general strip search issues, and not due to any constitutional issues. *Id.*, ¶ *15.* Several individuals, including Superintendent Byron and a transportation officer, protested to the sheriff that the new policy was compromising institutional security. *Id.*, ¶ *16.* The policy was then changed back to a blanket strip search policy. *Id.*, ¶ *17.*

There were institutional security concerns due to the Jail's design, its age, and its lack of space. *Id.*, ¶ *14.* Three small cells were used to handle pre-arraignment detainees within a crowded "booking area" or "intake area," which consisted of a desk area and a computer located within a few feet of the cells. *Id.*, ¶ *7.* All cells in the Jail had bars, instead of metal doors with windows as in the new facility, and as a result, prisoners could reach out from the cells, leading to security and contraband problems. *Id.*, ¶ *6.* There was the potential for pre-arraignment detainee contact with the general prison population if space was not available in the holding cells. *Id.*, ¶ *9, 23.* Contraband could easily be passed around by inmates. *Id.*, ¶ *6.* Although the record does not indicate a major contraband problem, there are some documented instances of contraband being confiscated from pre-arraignment detainees during the class period. *Id.*, ¶ *24-28.* In addition, contraband confiscated from detainees was not always documented or reported by correctional officers as required by policy. *Id.*, ¶ *25-27.*

STRIP SEARCH FACTORS

The Defendants state that the following factors required the imposition of a blanket strip search policy for all pre-arraignment detainees at the Jail during the class period:

Institutional Security Issues

The Jail was built in 1886. As a result, it was not comparable to a modern facility. The Jail was built in the older "linear" style (cells lining corridors offering only indirect surveillance); the new HOC was built in the modern "pod" style (two tiers of cells positioned within the perimeter of a common dayroom, which allows direct supervision of

all cells). The archaic condition of the Jail resulted in various security and contraband issues. The linear style of the jail also created security issues for both inmates and Jail personnel.

Booking Area

The Jail did not have cells designed specifically for pre-arraignment detainees. After Sheriff Macdonald took office, a booking area was constructed in the Jail in order to hold people who had been arrested by the local police departments and brought to the Jail. The space in the booking area was extremely tight, as someone in a jail cell could reach over to the booking desk and grab whatever items were placed on the desk.

Contraband

A review of the files of the approximately 900 pre-arraignment detainees that were brought into the Jail during the class period shows five instances of contraband being found on pre-arraignment detainees during strip searches.

Although when contraband was found it was to be reported to the shift commander, in practice contraband was not always reported. Therefore, the contraband problem was larger than indicated by the reports.

Intermingling

Pre-arraignment detainees would be kept overnight at the Jail, and there was a potential for pre-arraignment detainee contact with the general Jail population. Once a pre-arraignment detainee was booked, he or she would be placed into one of the three cells in the booking area until being taken upstairs to the jail block, to be housed with the

general population. The three cells in the booking area were used for housing pre-arraignment detainees overnight when there were no empty cells in the main block; otherwise, they would be kept open for new intakes. It was therefore impossible to separate the pre-arraignment detainees from the other inmates.

Overcapacity

The Jail was built in 1866. It was originally built to house 66 prisoners but, together with a modular addition that was built to house approximately 60, the Jail eventually housed up to 188. As a result, the Jail was well over design capacity. The design capacity for the new HOC is 288. The cells in the Jail were 48 square feet, compared to 80 square feet at the new HOC.

Multipurpose Jail

The Jail served as a multipurpose facility, in that it housed a wide variety of individuals, from those held in protective custody to felons serving their sentences, and also held both male and female inmates. Multipurpose facilities are more volatile than are regular county jails.

Unavailability of Alternatives

The three cells in the booking area were only used for housing pre-arraignment detainees overnight when there were no empty cells in the main block; otherwise, they would be kept open for new intakes. Due to space limitations in the Jail, there was no place to keep the records other than in one of the jail cells next to the records office. As a result, these cells could not be used for pre-arraignment detainees. Pre-arraignment

detainees could not be housed in the DDU (disciplinary unit) either, since the two cells were frequently occupied.

G.L. c. 126, s. 4

G.L. c. 126, s. 4 provides:

> Jails shall be used for the detention of persons charged with crime and committed for trial, committed to secure their attendance as witnesses upon the trial of criminal causes, committed pursuant to a sentence upon conviction of crime or for any cause authorized by law, or detained or committed by the courts of the United States. Jails may also be used for the detention of persons arrested without a warrant and not admitted to bail pending appearance before the district court, provided that no adequately equipped lock-up established in accordance with the provisions of section thirty-four of chapter forty is available for the detention of such person.

G.L. c. 126, s. 4.

Under this statute, the FCSO housed pre-arraignment detainees brought to the Jail during the evening and overnight by local police departments. The Jail was used by approximately 22 of the 26 city and town police departments in Franklin County to hold pre-arraignment detainees, as most local police departments in this rural county had no available facilities for holding these individuals overnight. The FCSO was not reimbursed by local towns for keeping detainees. As a result of the statute permitting jails to hold detainees where local lockups are unavailable, the Jail accepted numerous pre-arraignment detainees.

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

ARGUMENT

I. The strip search policy was reasonable under Bell and its progeny

The searches conducted pursuant to the policy, including those of the Plaintiff, were reasonable and were, therefore, constitutional. The United States Constitution forbids only unreasonable searches. *See* U.S. CONST. amend IV. Where searches are not unreasonable, the searches do not violate the United States Constitution. Given that the searches conducted pursuant to the policy were reasonable as a matter of law, judgment should enter for Defendants.

A. Bell v. Wolfish

Under the balancing test first enunciated by the Supreme Court in Bell v. Wolfish, 441 U.S. 520 (1979), "[b]oth convicted prisoners and pretrial detainees retain constitutional rights despite their incarceration, including basic Fourth Amendment rights against unreasonable searches and seizures." Id. at 545. The "Bell balancing test" requires courts to examine the following:

> The 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.
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> Id. at 559.

B. Bell's progeny in the First Circuit and District of Massachusetts

The following chronology of strip search cases within the First Circuit and the United States District Court in Massachusetts illustrates how the case law in strip search

cases has evolved since Bell:

1. Arruda v. Fair

In Arruda v. Fair, 710 F.2d 886 (1st Cir.1983), a prison's policy of strip searching inmates of a security unit when they were entering or leaving a prison law library or infirmary was upheld. In writing for the court, Judge Breyer found that "Wolfish cautions us to be most hesitant to overturn prison administrators' good faith judgments." Id. at 887.

2. Swain v. Spinney

The "reasonable suspicion" standard to be applied in strip search cases was first enunciated by the First Circuit in 1997 in Swain v. Spinney, 117 F.3d 1 (1st Cir.1997). This case concerned a female detainee who was strip searched after she was arrested along with her boyfriend, who had been arrested on theft and drug charges. The detainee in this case was arrested for a minor offense, searched at a local jail, and was subsequently held in a cell with no risk of contact with other prisoners. Id. at 8. In applying the Bell test in the context of misdemeanor detainees, the First Circuit concluded that "[s]trip and visual body cavity searches must be justified by at least a reasonable suspicion that the arrestee is concealing contraband or weapons." Id. at 7; *see also* Wood v. Hancock County, 354 F.3d 57, 62 (1st Cir.2003); Roberts v. Rhode Island, 239 F.3d 107, 113 (1st Cir.2001); Miller v. Kennebec County, 219 F.3d 8, 12-13 (1st Cir.2000). The application of this standard, however, has gone through numerous permutations since Swain was decided.

3. Roberts v. Rhode Island

The plaintiff in Roberts v. Rhode Island, 239 F.3d 107 (1st Cir.2001), challenged a policy of the Rhode Island Department of Corrections that required all males committed to state prison to be subjected to a strip search and visual cavity search. The First Circuit found that the institutional concerns in Roberts fell somewhere between Swain (local jail, no risk of prisoner contact) and those enunciated in Arruda (maximum security prison with a history of contraband problems) and Bell, and ultimately held the policy unconstitutional with respect to inmates charged with "only a misdemeanor involving minor offenses or traffic violations." Id. at 112. The court also held that Fourth Amendment rights must be balanced against the "legitimate goals and policies of the penal institution, and the need of the institution to maintain security." Id. at 110 (citing Bell, 441 U.S. at 546). To determine whether the government has a compelling reason and, therefore, does not need reasonable suspicion, courts have considered, among other things, the type of individual being searched, the history of contraband problems, the characteristics and dangerousness of the jail or prison population, and questions about commingling. Id. at 111-113; *see also* Gilanian, 431 F.Supp.3d at 176.

4. Ford v. City of Boston

Judge Gertner in Ford v. City of Boston, 154 F.Supp.2d 131 (D.Mass.2001) found that Boston's policy of performing strip searches without reasonable suspicion on all female city arrestees was unconstitutional as to "all class members charged with felonies or misdemeanors involving neither violence nor drugs, and class members held on default

warrants for similar offenses." Id. at 134. Judge Gertner also found that one of the major foundations for the institutional security concerns supporting the city's strip search policy, to keep contraband out of the city's jails, was not supported by the evidence, as only 5 of the female arrestees possessed contraband out of 8,000 searched. Ford has not been followed. *See also* DeToledo v. Suffolk, 379 F.Supp.2d 138, 148 (D.Mass.2005), discussed below.

5. Savard v. Rhode Island

Savard v. Rhode Island, 338 F.3d 23 (1st Cir.2003) involved a policy of strip searching individuals arrested for non-violent, non-drug related misdemeanors detained in a single, all-purpose penitentiary which housed "an array of prisoners ranging from newly sentenced felons to convicts under protective custody to pretrial detainees to arrestees. All of these individuals, except for detainees held in protective custody, were commingled while in various parts of the intake facilities." Id. at 26. The court noted that "[t]here are important differences between detaining an arrestee in virtual isolation [such as in Swain] and introducing an arrestee into the general population of a maximum security prison." Id. at 29.

The First Circuit stated in Savard that

> "the case law emphasizes that prison regulations may constitutionally impinge upon fundamental rights so long as such regulations are reasonably related to legitimate penological interests. [citations omitted]. Within the walls of a maximum security prison, the need to preserve internal security is compelling. [citations omitted] We think it follows that Rhode Island correctional officials reasonably could have regarded the stark differences between local lockups and maximum security prisons as pivotal in deciding whether a particular security-oriented policy was necessary."

Id. at 30-31.

The court in Savard noted differences between the facts in this case and the facts in two prior cases in the line of strip search decisions, Swain and Arruda. The plaintiff in Swain was held in virtual isolation after her arrest; therefore, the security concerns were minimal. "There are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population." Id. at 29. Arruda concerned a blanket strip search policy which was upheld in a case involving strip searches of convicted felons, not detainees arrested for misdemeanors as in Savard. Id. at 30.

In holding that qualified immunity applied in Savard, the court stated that

> "there is a distinction for qualified immunity purposes between an unconstitutional but objectively reasonable act and a blatantly unconstitutional act. Saucier, 533 U.S. at 206, 121 S.Ct. 2151; Anderson, 483 U.S. at 641, 107 S.Ct. 3034. Here, the lack of any direct precedent and the undulating contours of the law during the relevant period combine to persuade us that the constitutional violation was not obvious; the defendants reasonably could have thought, prior to Roberts I, that there was room in the law for the [correctional institution's] strip search policy."

Id. at 32.

In holding for the Defendants, however, the court noted that the claimed violations occurred before the Roberts decisions, by which the blanket strip policy would have been found unconstitutional. However, the court also acknowledged that the Roberts decision was limited to non-violent, non-drug-related misdemeanors. Savard, 338 F.3d at 27.

6. DeToledo v. Suffolk

The Plaintiff in DeToledo v. Suffolk, 379 F.Supp.2d 138 (D.Mass.2005), was a

visitor to a jail who was arrested and strip searched due to a felony warrant which had been recalled, and which the jail administrators incorrectly believed was still valid. The court found that whether "Swain settled the strip search issue in this Circuit with respect to pretrial detainees, as Judge Gertner thought in Ford, is thrown into doubt by subsequent First Circuit cases." Id. at 148. "In Roberts, 239 F.3d at 113, the Court of Appeals found a blanket strip search policy unconstitutional insofar as it applied to minor offenses. The court defined 'minor offenses' as '*misdemeanors* involving minor offenses or traffic violations.' Id. at 112 (emphasis added)." Id. at 149, fn. 15.

The court in DeToledo revisited the Swain versus Arruda argument:

> "In the end, we recognize that both Swain and Arruda offer valuable insights, but that neither is a very exact match. While Swain makes clear that strip searches ought not lightly to be indulged, the factual context of the case presented rather minimal security concerns. And while Arruda makes clear that institutional security needs may require intrusive measures in a maximum security setting, that case dealt not with persons arrested for relatively innocuous misdemeanors, but, rather, with hardened criminals. *So long as the facts in these cases are distinguishable in a fair way from the facts at hand - and we believe that they are - then neither of them can be said to have clearly established the law for purposes of a qualified immunity determination in the instant case.*"
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> Id. at 148 (*emphasis added*).

7. Doe v. Preston

In Doe v. Preston, 472 F.Supp.2d 16 (D.Mass.2007), the Department of Youth Services was sued for violating a juvenile detainee's constitutional rights by allegedly subjecting her to strip searches under a policy allowing such searches without reasonable suspicion of possession of contraband. The court held that the correctional officials were entitled to qualified immunity, as the law on the subject was not clearly established in the

context of a juvenile facility.

Doe is also of note due to the court's discussion of the application of the Bell reasonableness test:

> The First Circuit has applied this test to uphold strip searches of inmates housed within a security unit in a state correctional institution, Arruda v. Fair, 710 F.2d 886 (1st Cir.1983). The same test was used to find unreasonable under the Fourth Amendment searches that were conducted without reasonable suspicion that contraband was being concealed … by persons arrested for minor, non-violent offenses who were being detained pending arraignment either at a police station, Miller v. Kennebec County, 219 F.3d 8 (1st Cir.2000), and Swain v. Spinney, 117 F.3d 1 (1st Cir.1997), or at a detention facility, Roberts v. Rhode Island, 239 F.3d 107 (1st Cir.2001). In each case, the court of appeals gave consideration to the various competing interests as they appeared in the particular circumstances of the case at hand, just as the Bell v. Wolfish test requires.
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> Id. at 22.

C. Applying the Bell test to the searches at issue here result in the conclusion that the searches were reasonable

Unreasonable search and seizure must be balanced against the promotion of legitimate governmental interests. Bell, 441 U.S. at 545. These interests include the "legitimate goals and policies of the penal institution, and the need of the institution to maintain security." Roberts, 239 F.3d at 110 (citing Bell, 441 U.S. at 546). The institution "may provide a *compelling* reason for a warrantless strip search absent reasonable suspicion" to advance the legitimate need for institutional security. Id. at 110.

This court must examine the components of the Bell balancing test to determine whether the policy was constitutional. This court must therefore consider the scope of the particular intrusion, the manner in which it was conducted, the justification for initiating it, and the place in which it was conducted. Bell, 441 U.S. at 559.

1. The scope of the particular intrusion

A strip search of the type that was allowed by the Jail's policy "instinctively [gives the Court] … pause." Bell, 441 U.S. at 558. The court should examine the remaining three components to determine the policy's constitutionality.

2. The manner in which it was conducted and the place in which it was conducted

There were no issues raised by the Plaintiff as to whether the manner in which the searches were conducted (no allegation that the visual body search itself was conducted unlawfully) or the place in which the searches occurred (in private in one of the holding cells) were unconstitutional. This leaves the court to analyze the justification put forth by the Defendants to implement the policy.

3. The justification for initiating the search

The Defendants submit numerous reasons relating to the archaic Jail conditions, as set forth in the Factors section of this Memorandum, as reasons for implementing the blanket strip search policy. These include: institutional security issues; the condition of the booking area; contraband issues; intermingling; overcapacity issues; the multipurpose Jail facility; unavailability of alternatives for housing pre-arraignment detainees; and the interplay of G.L. c. 126, s. 4 and the lack of local lockups in rural Franklin County. These are sufficient justifications to tip the balance of the Bell test in favor of the Defendants. Further, once the HOC opened, it solved many of the institutional security problems that existed at the Jail, and the policy was immediately changed.

II. The factors enunciated in the Gilanian case provide a "compelling reason" for a blanket strip search policy, and thus a complete defense to the Plaintiff's claims

The "undulating contours" of strip search cases in the First Circuit and Federal courts in Massachusetts preceding and during the class period took yet another sharp turn in Gilanian, in which Judge Gertner retreated from the rigid analysis that she set forth in Ford, in holding that "[i]f corrections personnel lack particularized, individualized reasonable suspicion, they may nevertheless conduct a strip-search pursuant to a blanket search policy if that policy is properly justified by other considerations." Id. at 176.

Gilanian enumerated various factors that a court must consider in determining whether the government has a compelling reason to conduct a strip search without the need for reasonable suspicion. In determining whether a blanket strip search is justified, courts may consider, among other things, "the type of crime with which a group of inmates is charged, the institution's history of contraband and safety problems, the existence or lack of less restrictive alternative policies, the characteristics and dangerousness of the jail or prison population, and the questions of whether the inmates to be searched have mingled with the general jail population or had contact with outside visitors." Id. at 176. Each Gilanian factor is addressed separately below.

A. Gilanian factors

1. Type of crimes

In Roberts, the First Circuit, citing Swain, ruled that detainees held in local jails

for minor offenses[1] cannot be strip searched without reasonable suspicion.[2] It seems clear that, in addressing the Gilanian factors, only those detainees charged with certain misdemeanors and strip searched at the Jail would fall within the protected class. The First Circuit has not fully defined what type of misdemeanors are included, aside from "minor offenses and traffic violations" (Roberts) and "non-violent, non-drug related misdemeanors" (Savard). (Ford, a Massachusetts District Court case, additionally includes as a protected class "all class members charged with felonies or misdemeanors involving neither violence nor drugs, and class members held on default warrants for similar offenses," id. at 134, but, as discussed above, no other court has adopted the holding in Ford.)

2. Contraband and safety problems

The second Gilanian factor is "the institution's history of contraband and safety problems." The existence of contraband and safety issues were the driving forces behind the implementation of the FCSO's blanket strip search policy.

a. Contraband

Of the approximately 900 pre-arraignment detainee files reviewed at the FCSO, there were five incident reports of contraband found on detainees during strip searches. [3]

1 The Court in Roberts defined "minor offenses" merely as "misdemeanors involving minor offenses or traffic violations." Id. at 112.

2 But note: "The arrestee in Swain was held in isolation in a temporary holding facility where there was no risk of contact with other prisoners. That fact, and the difference in magnitude between security concerns in a holding cell and those in a prison, led an equally divided *en banc* Court in Savard to conclude that neither Swain (nor Arruda) gave definitive guidance with respect to pretrial detainees." DeToledo, 379 F.Supp.2d at 148.

3 The Plaintiff makes much of the fact that only one of the instances of contraband was found as a result of a strip search. The issue, however, is whether contraband is being brought into the institution.

This is only the contraband that was documented during the class period; there was other contraband found during this time period that was not properly documented.

Although the Plaintiff's argument in its Memorandum relies heavily on the alleged lack of contraband found during strip searches at the Jail, it is a substantially higher ratio than in Ford (5 instances of contraband found on nearly 8,000 detainees) – indeed, almost a tenfold increase.

b. Safety

Issues concerning the safety of detainees and Jail personnel also drove the implementation of the Jail's strip search policy, as set forth in the Factors section of this Memorandum.

3. Characteristics and dangerousness of the jail

The First Circuit in Roberts found that a strip search performed on an arrestee for a nonviolent crime was unconstitutional absent particularized suspicion. The defendant Rhode Island argued that the heightened security concerns of the intake facility, a maximum security prison where pretrial detainees were held prior to trial and sentencing, required a strip search of all detainees, an argument that the court rejected.

The holding in Roberts was further defined in Savard, where the court held that "the population of a maximum security prison tends to be much more volatile and much less transient than that of a county jail." Savard, 338 F.3d at 31.

The courts have generally held that the higher the security level, the more dangerous the facility, and consequently the greater the institutional security concerns.

Although the Jail was a county institution, it served as a multipurpose facility, housing a variety of inmates, from those in protective custody to federal prisoners to felons serving sentences in the house block. Therefore, its population was much more volatile than the typical county jail noted in Savard. Further, the antiquated facility significantly raised the level of danger to both inmates and staff.

4. The existence or lack of less restrictive alternative policies

The antiquated nature of the Jail and its overcapacity problem did not leave any alternative but to allow intermingling of inmates and pre-arraignment detainees. It also inhibited correctional officers' capability to oversee the inmates. The ability of inmates to reach out of their cells through the bars posed both a security risk and promoted contraband circulation.

The differences between the old and new institutions are remarkable. The linear layout and open bars of the old Jail inhibited officer supervision and allowed contact both between the cells themselves and between the cells and anyone walking through the hallways, which promoted the exchange of contraband and increase security risks to inmates and officers. The linear design inhibited correctional officers' ability to oversee inmates. Thus, the Jail could be as dangerous as a maximum security prison, and makes the penological interests addressed by a blanket strip search policy more compelling.

5. Intermingling

Pre-arraignment detainees were intermingled with the general population in the Jail, which created additional security problems. The court in Roberts held that

intermingling alone will not justify a strip search without reasonable suspicion, as commingling was "potentially alterable." Due to the antiquated condition of the Jail, however, the commingling situation was unalterable, as there was no real alternative for separating detainees from inmates, or for housing pre-arraignment detainees elsewhere in the facility.

B. Conclusion

Based on the above analysis of the Gilanian factors, the Defendants had a compelling reason to adopt a policy which allowed for strip searches at the Jail without the need for reasonable suspicion.

III. The absolute defense of qualified immunity bars an action against the Defendants due to the archaic nature of the Franklin County Jail

> "The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to anticipate precisely the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged review.... [T]he lack of any direct precedent and the undulating contours of the law during the relevant period combine to persuade us that the constitutional violation was not obvious; the defendants reasonably could have thought … that there was room in the law for the [defendants'] strip search policy."
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> Savard, 338 F.3d at 32.

In order to determine whether qualified immunity applies in the instant matter, the court must assess whether the law was clearly established when the strip search policy was in place.

A. Summary of the law

The doctrine of qualified immunity "protects public officials from the specter of damages liability for judgment calls made in a legally uncertain environment." Ryder v. United States, 515 U.S. 177, 185 (1995). In the line of cases involving strip searches, courts have held that "[t]he doctrine of qualified immunity protects public officials from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Cox v. Hainey, 391 F.3d 25, 29 (1st Cir.2004) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). A plaintiff in a §1983 case must demonstrate that State officials, when sued in their individual capacities, violated the plaintiff's "clearly established rights" in order to overcome qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818-819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 142 (1993).

The First Circuit applies a three step analysis to determine whether qualified immunity applies:

> (1) whether the claimant has alleged the deprivation of an actual constitutional right; (2) whether the right was clearly established at the time of the alleged action or inaction; and (3) if both of these questions are answered in the affirmative, whether an objectively reasonable official would have believed that the action taken violated that clearly established constitutional right. Wilson v. City of Boston, 421 F.3d 45, 52 (1st Cir.2005) (quoting Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 141 (1st Cir.2001)).
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> Marcello v. Maine, 489 F.Supp.2d 70, 80 (D.Me.2007).

Of particular interest in this analysis is the second prong, "whether the right was clearly established at the time of the alleged action or inaction":

> *A government official making a policy decision is entitled to qualified immunity if the law was not clearly established at the time the determination was made*. If the law is unclear, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Id. In order to make a determination whether that right was clearly established at the time it was violated, a "court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a consensus of persuasive authority elsewhere." Savard v. R.I., 338 F.3d 23, 28 (1st Cir.2003). *Accord* Wilson v. Layne, 526 U.S. 603, 617 (1999); Brady v. Dill, 187 F.3d 104, 116 (1st Cir.1999). *If the case law is sufficiently unsettled, and the Court cannot conclude that there is a consensus of authority as to a prisoner's right, the right is not clearly established and defendants are immune from claims for damages.* Id.
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> Tardiff v. Knox County, 397 F.Supp.2d 115, 140 (D.Me.2005) (*emphasis added*).[4]

B. The scope of the right in this case was not clearly established

The presence of a balancing test is a crucial factor indicating that the scope of the right in this case was not clearly established. Here, a balancing test must be employed in order to determine if a policy or practice is unreasonable and, therefore, violates the Fourth Amendment to the United States Constitution. Multiple circuits have recognized that only in the most unusual circumstances will it be fair to say that the scope of a right is clearly established where the assessment of that right is subject to a balancing test. The First Circuit in Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992), stated:

> [i]f the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered "clearly established," at least in the absence of closely corresponding factual and legal precedent.
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> Id. at 931, quoting Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987).

As there are no First Circuit decisions (or decisions from any other circuits) concerning blanket strip search policies imposed due to the archaic nature of a jail, the Defendants have qualified immunity as to all of the potential class action plaintiffs due to their reasonable belief that the condition of the jail necessitated a blanket strip search policy. Underlying Sheriff Macdonald's belief that the strip search policy was specifically related to the conditions at the Jail was his decision to begin working to secure funds to build a new facility after the blanket strip search policy was reinstated in 1999, in part to resolve institutional security issues surrounding pre-arraignment detainees and the statutory obligation imposed by G.L. c. 126, s. 4. In addition, his decision to change the policy to a "reasonable suspicion" standard immediately upon the opening of the new, state-of-the-art HOC evidences that the institutional security problems had been the driving force behind the old policy.

The detainees' rights were not clearly established during the applicable class period because the antiquated jail presented unusual security concerns. There is no "clearly established" law forbidding a blanket strip search policy in a unique facility like the Jail.

Further, the "undulating contours" of the law with respect to the constitutionality of strip searches in penal institutions prior to and during the class action period, as discussed in Section I of this Memorandum, evidences that there was no "clearly established" law during this time period. "If the case law is sufficiently unsettled, and the

4 Plaintiff's counsel in the present matter represented the class in Tardiff.

Court cannot conclude that there is a consensus of authority as to a prisoner's right, the right is not clearly established and defendants are immune from claims for damages." Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir.2003). Indeed, there are numerous cases holding that, where the defendants did not know that conducting blanket strip searches was unconstitutional due to institutional security concerns, the law was not clearly established and qualified immunity applied. *See* Savard (Court held defendant could not have known strip search policy (policy of strip searching individuals arrested for non-violent, non-drug related misdemeanors detained in a penitentiary housing an array of prisoners who were commingled) was unconstitutional); DeToledo ("So long as the facts in these cases are distinguishable in a fair way from the facts at hand - and we believe that they are - then neither of them can be said to have clearly established the law for purposes of a qualified immunity determination in the instant case."); and Doe (correctional officials were entitled to qualified immunity in lawsuit brought by juvenile detainee allegedly subjected to strip searches under policy allowing such searches without reasonable suspicion of possession of contraband, as the law on the subject was not clearly established in the context of a juvenile facility).

Whether the "reasonable suspicion" standard should be applied with respect to detainees comingled in an archaic jail has not been clearly established. It would have been difficult, given the conditions in existence at the Jail prior to and during the class period, for the Defendants to determine exactly what the Constitution required in the way of a proper strip search policy at the Jail. The Defendants erred on the side of

institutional safety. As a result, they are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

ARGUMENT

In Bell, the primary justification offered by the Supreme Court for initiating strip searches without reasonable suspicion was the need to discover and confiscate contraband. Bell, 441 U.S. at 559. The Supreme Court determined that this justification was sufficient to validate that search policy. The justification offered in Arruda was to preclude or lessen the introduction of contraband into the prison. Arruda, 710 F.2d at 887-888. There, the court determined that the justification was sufficient to make the policy reasonable. In Swain, the justifications put forward were institutional security and ensuring that an arrestee is not concealing contraband or weapons. Swain, 117 F.3d at 7. In Roberts, the justification offered was "a concern for institutional security." Roberts, 239 F.3d at 110-111. In both Swain and Roberts, while recognizing the legitimacy of the justifications offered, the courts found that there were not sufficient facts to render the policies reasonable.

Addressing the institutional security concern in Roberts, the court recognized that "[i]ntermingling of inmates is a serious concern that weighs in favor of the reasonableness, and constitutionality, of the search," but was not "in itself, dispositive of

the reasonableness of the search." Roberts, 239 F.3d at 112-113. Here, unlike in Roberts, intermingling is one, but not the only, concern justifying the searches at issue. Id. at 112.

Declaring that the searches conducted under the policy at issue in the instant case were reasonable is consistent with the reasoning in Roberts. The court's holding in that case requiring individualized reasonable suspicion for a strip search relied on the fact that the plaintiffs faced misdemeanor or minor offense charges. Id. at 112. In keeping with this reasoning, routine searches of individuals charged with felonies, or charged with misdemeanors involving weapons, drugs, or violence, are reasonable.

In the instant matter, the Defendants submitted evidence of numerous reasons for the policy, each of which is discussed previously in this Memorandum. Further, the policy was changed once the HOC opened, as the new facility solved many of the serious problems that existed at the Jail. The combination of these factors should result in the conclusion that the strip search policy was reasonable. As set forth above, the justifications for the Policy in this case far exceed any of the justifications offered in Bell, Arruda, Swain or Roberts.

CONCLUSION

WHEREFORE, Defendants request this Honorable Court to grant summary judgment in their favor, and deny the Plaintiff's Motion for Summary Judgment.

Respectfully submitted,
FREDERICK B. MACDONALD and FORBES BYRON,

By their attorney,
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DATED: December 22, 2008

CERTIFICATE OF SERVICE

I, Kerry Strayer, hereby certify that on December 22, 2008, I served a copy of the foregoing **Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment,** by first-class mail, postage prepaid, to Howard Friedman, Esq., and David Milton, Esq., LAW OFFICES OF HOWARD FRIEDMAN, P.C., 90 Canal Street, 5th Floor, Boston, MA 02114, counsel for Plaintiffs.

___/S/ Kerry Strayer_____
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