UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD JONES, Plaintiff, v. **GOVERNMENT OF THE DISTRICT OF COLUMBIA,** Defendant.	**Civil Action No.: 16-2405 (CKK)**

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendant's Motion to Dismiss [17] Mr. Jones' First Amended Complaint ("FAC") [12] should be denied because Mr. Jones' pleads sufficient plausible facts to state a claim for each claim pled in the First Amended Complaint and the District does not raise any legally valid arguments.[1]

Standard of Review

A plaintiff's complaint need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. A complaint must give the defendants notice of the claims and the grounds upon which they rest, but "[s]pecific facts are not necessary." Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 681 (2009); Jones v. Kirchner, 835 F.3d 74, 79 (D.C. Cir. 2016). At the motion to dismiss stage the reviewing court must treat the complaint's factual allegations as true and must grant plaintiff the

[1] Mr. Jones does not plead an Eighth Amendment over-detention claim in the First Amended Complaint.

benefit of all inferences that can be derived from the facts alleged. Atherton, 567 F.3d at 677; Jones, 835 F.3d at 79.

I. Mr. Jones States Over-Detention Claims on Both the Predicate Violation and the Monel Prong for all of his Constitutional Over-detention Claims.

Mr. Jones alleged that he was a court return entitled to release by virtue of a court ordered release obtained at a court hearing returned to the DC Jail after a federal Judge ordered his release and that he was held for several hours after R&D staff returned him to his cell, and subjected to a degrading strip-search before being released. FAC, ¶ 127-134. The total period of his over-detention from the time when the District Court judge ordered his release until he was released from the DC Jail was more than five hours. Id.

"[I]n considering whether a plaintiff has stated a claim for municipal liability, the district court must conduct a two-step inquiry. First, the court must determine whether the complaint states a claim for a predicate constitutional violation. Second, if so, then the court must determine whether the complaint states a claim that a custom or policy of the municipality caused the violation." Sheikh v. District of Columbia, 77 F. Supp. 3d 73, 84 (D.D.C. 2015) citing Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003). Mr. Jones satisfies both of these steps as described below for all of his Constitutional over-detention claims.

A. Mr. Jones states a claim for a predicate constitutional violation for both a 5th Amendment and a 4th Amendment over-detention claim.

Mr. Jones states a claim for a predicate constitutional violation for both a 5th Amendment substantive Due Process and a 4th Amendment over-detention claim.

1. Even a thirty-minute overdetention of a court return after they have been ordered released could work a violation of the person's constitutional liberty rights.

"While there is no set definition for an "overdetention," it generally means that once a prisoner was entitled to release -- because of a court order, the expiration of a sentence, or otherwise -- the authority having custody over that person held them too long." Barnes v. District of Columbia, 793 F. Supp. 2d 260, 266 (D.D.C. 2011). Even a thirty-minute overdetention of a prisoner after they have been ordered released could work a violation of the person's constitutional liberty rights under the Fourteenth Amendment. Id. at 276.

District Courts have held that over-detentions of court returns as short as two and a half to three hours state 4th Amendment over-detention claims. *See e.g.*, Arline v. City of Jacksonville, 359 F. Supp. 2d 1300, 1308 (M.D.Fla.2005) (jury question as to whether or not plaintiff's two and half hour detention following his acquittal on all criminal charges violated the Fourth Amendment); Jones v. Cochran, 1994 U.S. Dist. LEXIS 20625 (S.D. Fla. 1994)(three hours). A court return is someone who leaves a DOC facility for court and returns on the same day. FAC, ¶ 24.

Mr. Jones states a predicate claim because he was overdetained for more than five hours from the time the District Court ordered his release until the DOC released him from the DC Jail. FAC, ¶ 127-134. His over-detention included the time from when the Marshals handed him off to DOC transport staff at the DC Jail after the District Court Judge ordered his release, transport time from the federal courthouse to the R&D post at the DC Jail, processing time in R&D, and the several hour period from the R&D staff returned him to his cell until his eventual release

from the DC Jail. FAC, ¶ ¶ 128-133. This period is sufficient to state a claim under the motion to dismiss standard under the case law and given the District's concession in Barnes that it needed only two to two and ½ hours to process a release. Barnes, 793 F. Supp. 2d at 278-79 (undisputed that the DOC's release process should take from 2 to 2.5 hours to complete). *See* District's memorandum of law [17-1], p. 7 ("Memorandum").

None of the reasons the District sets out in its motion to dismiss undermine these claims under the motion to dismiss standard. The District's reliance on Judge Lamberth's summary judgment opinion in Barnes is misplaced because of the different standard employed at summary judgment, Atherton, 567 F.3d at 677, and because of the developed factual record available at summary judgment which is not available here in a motion to dismiss. *See* Barnes v. District of Columbia, 242 F.R.D. 113, 116 (D.D.C. 2007).

2. Mr. Jones' over-detention in DOC custody runs from when the District Court Judge ordered his release until the DOC released him from custody from the DC Jail.

Mr. Jones alleged that he was over-detained for more than just "several hours." FAC, ¶ 132. He was held for "several hours" just at the DC Jail after the R&D staff returned him to his cell until his release. FAC, ¶ 130-132. To this "several hours" period must be added the time from when the District Court Judge ordered his release up until the R&D staff returned him from his cell. FAC, ¶ 128-132.

For purposes of Mr. Jones' 4th Amendment and the 5th Amendment over-detention claims, FAC, Claim 1, (and his common law false imprisonment claim, FAC, Claim 4) Mr.

Jones' over-detention in DOC custody is measured from when the District Court Judge ordered his release until the DOC released him from custody.

For purposes of Mr. Jones' procedural due process liberty interest claim Mr. Jones' over-detention in DOC custody is measured from when the courtroom Marshals handed him into the custody of the DOC transport staff until the DOC released him from custody at the DC Jail. *See* D.C. Code § 24-211.02a(a)(2) (an inmate ordered released pursuant to a court order shall be released within 5 hours of transfer from the custody of the United States Marshals Service into the custody of the Department of Corrections unless the inmate has other holds). FAC, Claim 2.

Mr. Jones pled that after a judge ordered his release at the federal courthouse, the DOC transported him back to the DC Jail instead of releasing him from the courthouse or the MHU. FAC, ¶ ¶ 128-129. Upon arrival at the DC Jail R&D area Jail staff returned him to his cell instead of holding him in the R&D area. FAC, ¶ ¶ 131-32. They DC Jail did not release for several hours after returning him to his cell. FAC, ¶ ¶ 131-32. Mr. Jones pled in the alternative that he was held more than five hours before release "after being transferred by the Marshals in the courthouse to the DOC transport officers. FAC, ¶ 133.

The District contends that this Court should not accept plaintiff's alternatively pled facts. Memorandum, p. 7. But the District does not state any facts or law why this Court should not accept Mr. Jones' alternatively pled facts.

Until plaintiffs take discovery on this issue they must plead facts in the alternative. This situation – plaintiffs not having access to facts known solely to the defendant until after discovery – is so common that the drafters of the federal Rules specifically provided for it. Fed.

R. Civ. P. 8(d)(2); Elena v. Municipality of San Juan, 677 F.3d 1, 8 (1st Cir. 2012); Whitney v. Guys, Inc., 700 F.3d 1118, 1130 (8th Cir. 2012).

Mr. Jones alleges that the DC Jail did not release him for "several hours" after returning him to his cell after he was processed in the R&D post at the DC Jail. FAC, ¶ 132. Several is an indeterminate number that means "more than two but fewer than many." Merriam Webster, https://www.merriam-webster.com/dictionary/several. "Many" means consisting of or amounting to a large but indefinite number. So, based on this analysis, Mr. Jones was held for more than five hours just after being sent to his cell from the R&D post after returning to the DC Jail. This several hour period is in addition to the separate period of time which elapsed from when the District Court ordered his release in the courtroom at his hearing until the R&D staff returned him to his cell.

Mr. Jones's allegation in the alternative is that he was held more than five hours before release "after being transferred by the Marshals in the courthouse to the DOC transport officers. FAC, ¶ 133. *See* D.C. Code § 24-211.02a(a)(2) (an inmate ordered released pursuant to a court order shall be released within 5 hours of transfer from the custody of the United States Marshals Service into the custody of the Department of Corrections unless the inmate has other holds). So, to the "several hours" Mr. Jones spent in DOC custody from the time he left the R&D post in the DC Jail until his release from the DC Jail must be added the period of time from when the courtroom Marshals handed him over to the DOC transport people (after the District Court Judge ordered his release), the time it took for the DOC transport people to process him and transport him to the DC Jail R&D, and the time the R&D spent processing him before returning him to his

cell. This time period easily exceeds five hours drawing inferences in favor of Mr. Jones as the motion to dismiss standard requires. Atherton, 567 F.3d at 677.

3. Mr. Jones states a 5th Amendment over-detention claim.

Courts have uniformly recognized that over-detaining prisoners after they become entitled to release violates their 14th Amendment (or in the case of District prisoners, their 5th Amendment) due process liberty rights. Even a thirty-minute overdetention of a prisoner after they have been ordered released could work a violation of the person's constitutional liberty rights under the Fourteenth Amendment. Barnes, 793 F. Supp. 2d at 276.

For example, in Young v. City of Little Rock, the Eighth Circuit affirmed a $100,000 jury verdict in favor of a court return who was sent from court (where the judge ordered her released) back to the jail for "out-processing" and a strip-search violated due process even though the over-detention was only thirty minutes and even though the defendant argued that it should have been allowed some time for "out-processing," that is, the administrative steps necessary for release. 249 F.3d 730, 736 (8th Cir. 2001). Significantly, the Young Court rejected the defendants' contention that "some period of time must be allowed for an order of release to be carried out, and that certain administrative formalities (referred to as "out-processing") are permissible," holding that, "Certainly the jury might have accepted this argument, but we do not think it had to." Young, 249 F.3d at 735-36.

Nothing in Judge Lamberth's summary judgment opinion in Barnes is to the contrary. As explained in detail below, Judge Lamberth did not hold that delaying a court return's release to check for other cases, warrants, or detainers is an automatic justification for over-detaining a

court return entitled to release. Barnes, 793 F. Supp. 2d at 275. He merely stated that "Temporarily retaining custody over an inmate who is entitled to release in order to accomplish administrative tasks incident to that release is not *per se* unconstitutional." Barnes, 793 F. Supp. 2d at 275.

Provided that a pleading states a claim for relief under the plausibility standard, it is not necessary for the pleading to also rebut other possible explanations for the conduct alleged, even if those alternatives might appear to be more likely. Jones v. Kirchner, 835 F.3d at 79–80 (plaintiff stated plausible Fourth Amendment claim for failure to knock-and-announce by pleading that he did not hear any knock or announcement; not necessary to plead additional facts to rebut possibility that knock-and-announce occurred, but was simply not heard by plaintiff). Therefore, at this stage, "before evidence is available and before the Defendants have even denied the allegations against them," Mr. Jones is not required to plead facts showing that the over-detention was justified by out-processing tasks. 835 F.3d at 80.

Thus, under this precedent, at the motion to dismiss stage, Mr. Jones clearly states an over-detention claim under the 5th Amendment.

4. Mr. Jones states a 4th Amendment over-detention claim.

Moreover, courts routinely hold, especially at the motion to dismiss stage, that removing court returns entitled to release from the courtroom to send them back to the jail in irons for release processing violates the 4th Amendment. *See* Barnes v. District of Columbia, 242 F.R.D. 113, 118 (D.D.C. 2007)(plaintiffs' allegations of Fourth Amendment violations are sufficient to survive a motion to dismiss).

District Courts have held that over-detentions of court returns as short as two and a half to three hours state 4th Amendment over-detention claims. *See e.g.,* Arline v. City of Jacksonville, 359 F. Supp. 2d at 1308 (jury question as to whether or not plaintiff's two and half hour detention following his acquittal on all criminal charges violated the Fourth Amendment); Jones v. Cochran, 1994 U.S. Dist. LEXIS 20625 (S.D. Fla. 1994)(three hour over-detention; defendant's motion for summary judgment denied as to both plaintiffs' 4th Amendment and 14th Amendment over-detention claims where defendant had a practice or policy of returning acquitted court returns to jail for release and a strip-search instead of releasing them from the courtroom; mere possibility that another warrant was in existence does not qualify as a particularized suspicion justifying practice). Other District Courts have held that plaintiffs state 4th Amendment claims for longer periods as well. Shultz v. Dart, 2013 U.S. Dist. LEXIS 156546, at *9, at *14-15 (N.D. Ill. Oct. 31, 2013)(court return states both 4th Amendment and 14th Amendment claims for brief over-detention after he was returned from court where a judge ordered his release back to the jail; "why send an unescorted free man into the general population of Cook County Jail?").

The rationale of these cases is that once a judge orders someone released in the courtroom they are free, and taking them back into custody and transporting them back to the jail constitutes a "re-seizure" under the 4th Amendment. *See e.g.*, Shultz v. Dart, 2013 U.S. Dist. LEXIS 156546, at *14-15; Otero v. Dart, No. 12 C 3148, 2016 U.S. Dist. LEXIS 1389, at *15 (N.D. Ill. Jan. 7, 2016).

So Mr. Jones also states a 4th Amendment claim for his "several hour" over-detention claim.

5. Defendant's discussion of Mr. Jones's 5th Amendment substantive due process over-detention claim.

The District discusses Mr. Jones' 5th Amendment substantive due process over-detention claim at pages 9 to 10. Memorandum, p. 9-10. First, the District contends that Plaintiff cannot meet the standard set forth in *Cohen*, because there are *no* facts alleged in the Complaint sufficient to infer that the "detention"—which lasted several hours—was so egregious that it may fairly be said to shock the contemporary conscience. Memorandum, p. 10.

Not so. Mr. Jones satisfies this standard by pleading an over-detention in excess of several hours, more than five. Even a thirty-minute overdetention of a prisoner after they have been ordered released could work a violation of the person's constitutional liberty rights under the Fourteenth Amendment. Barnes, 793 F. Supp. 2d at 276; Young, 249 F.3d at 736.

The cases the District cites are distinguishable. The liberty at issue in this case is a person's right to be free from unjustified confinement. This liberty interest is deeply rooted: "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Barnes, 793 F. Supp. 2d at 275.

In contrast, George Wash. Univ. v. D.C., 355 U.S. App. D.C. 12, 318 F.3d 203, 205 (2003) and Silverman v. Barry, 269 U.S. App. D.C. 327, 845 F.2d 1072, 1074 (1988) are zoning disputes.

The standard announced in Cohen is that "In order to establish a substantive Due Process claim, a plaintiff must show that the state actor was deliberately indifferent to his constitutional rights and that such conduct shocks the conscience." Cohen v. District of Columbia, 744 F. Supp.

2d 236, 243 (D.D.C. 2010). Without deciding whether the subjective or objective standard applies to deliberate indifference in the foster care context, the District Court held that at the summary judgment stage the plaintiff failed to establish that the defendants "knew or should have known" that the foster child was at substantial risk of harm, and that they failed to act in the face of such a risk." Cohen, 744 F. Supp. 2d at 245. This case is at the motion to dismiss phase which present a different standard more favorable to plaintiff. A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that . . . recovery is very remote and unlikely." Atherton, 567 F.3d at 681.

Judge Collyer's comments about the applicable standard in Farmer v. Brennan, 511 U.S. 825, 837 (1994) are (1) *dicta*; and (2) distinguishable because that case deals with the level of subjective knowledge required to hold an individual prison official liable in their individual capacity. The District is an entity defendant.

Anyway, with respect to an entity defendant, the "inquiry is an objective one—the factfinder must ask "whether the municipality knew or should have known of the risk of constitutional violations."" Lightfoot v. District of Columbia, 273 F.R.D. 314, 321 (D.D.C. 2011) *citing* Farmer v. Brennan, 511 U.S. 825, 841, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).

Mr. Jones establishes that the First Amended Complaint states a claim for the District's entity liability below in a separate section.

6. The District's citation to Judge Lamberth's summary judgment opinion in Barnes with respect to the 4th Amendment claim is inapposite at the motion to dismiss phase.

The District, citing Judge Lamberth's summary judgment opinion in Barnes, contends that "this Court has held that an overdetention does not constitute a Fourth Amendment violation,." 793 F. Supp. 2d at 273-74. Memorandum [17-1], p. 6. But, the District's citation of the Barnes summary judgment opinion on this point ignores the procedural posture of this case and the difference in standards between a 12(b)(6) motion and a summary judgment motion. At the motion to dismiss stage the reviewing court must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. Atherton, 567 F.3d at 677; Jones, 835 F.3d at 79. In Barnes, Judge Lamberth ***denied*** the District's motion to dismiss plaintiffs' 4th Amendment over-detention claim holding that plaintiffs allegations that "they essentially were re-arrested or re-seized … are sufficient to survive a motion to dismiss, and further development of the record should disclose whether the seizures were reasonable." Barnes, 242 F.R.D. at 118.

So District Courts routinely deny motions to dismiss over-detention claims based on the 4th Amendment at the motion to dismiss stage. Barnes, 242 F.R.D. at 118 (plaintiffs' allegations of Fourth Amendment violations are sufficient to survive a motion to dismiss); Shultz v. Dart, 2013 U.S. Dist. LEXIS 156546, at *14-15 (N.D. Ill. Oct. 31, 2013)(at motion to dismiss stage court return states both 4th Amendment and 14th Amendment claims for brief over-detention after he was returned from court where a judge ordered his release back to the jail). The rationale of these cases is that once a judge orders someone released in the courtroom they are free, and taking them back into custody and transporting them back to the jail constitutes a "re-seizure" under the 4th Amendment. *See e.g.*, Shultz v. Dart, 2013 U.S. Dist. LEXIS 156546, at *9.

Of course, Courts even deny summary judgment to defendants where plaintiffs base their over-detention claims on the 4th Amendment. Otero v. Dart, 2016 U.S. Dist. LEXIS 1389, at *20 (N.D. Ill. Jan. 7, 2016)(court return plaintiff presented sufficient evidence creating a genuine issue of material fact for trial that Defendant's overdetention policy is unreasonable under the Fourth Amendment); Arline v. City of Jacksonville, 359 F. Supp. 2d at 1308 (jury question as to whether or not plaintiff's two and half hour detention following his acquittal on all criminal charges violated the Fourth Amendment); Jones v. Cochran, 1994 U.S. Dist. LEXIS 20625, 13-17, 17-18 (S.D. Fla. 1994)(defendant's motion for summary judgment denied as to both plaintiffs' 4th Amendment and 14th Amendment over-detention claims where defendant had a practice or policy of returning acquitted court returns to jail for release and a strip-search instead of releasing them from the courtroom; mere possibility that another warrant was in existence does not qualify as a particularized suspicion justifying practice).

Moreover, a careful reading of Judge Lamberth's summary judgment opinion shows that he did not rule as a matter of law that plaintiffs in an over-detention case could never prevail on a 4th Amendment over-detention claim. Judge Lamberth wrote that, "plaintiffs were already in custody at the time they were ordered released or their sentences expired. Their freedom of movement had already been terminated," so there was no "seizure" under the 4th Amendment. Barnes, 793 F. Supp. 2d at 274. But, Judge Lamberth also wrote, "plaintiffs haven't presented any facts suggesting that their overdetentions involved fresh "seizures" warranting a Fourth Amendment analysis." Id. The cases cited above show that the Judge's order releasing a court return is the legally significant event that legally ends the lawful detention. The Marshals' "stepping back" a court return, or handing them off to the DOC, constitutes a physical-seizure

7. Detaining a court return after a judge has ordered their release to check for other cases, warrants, or detainers holding the court return is not an automatic justification for over-detaining a court return entitled to release.

These cases cited above – whether decided under the 4th Amendment or the 5th/14th Amendment – also make clear that time spent "out-processing" a "court return" after their court appearance – checking for other cases, warrants, or detainers holding the court return – is not an automatic justification for over-detaining a court return entitled to release. *See e.g.*, Young, 249 F.3d at 735-36. These cases hold that checks for other cases, detainers, and warrants can or even should be performed before the court appearance or at least while the defendant is still in the courtroom. "[M]any, if not most, of the administrative tasks incident to an inmate's release can be undertaken prior to the expiration of a sentence or before a jail's receipt of a paper court order authorizing release -- unlike in the probable cause context, where all of the administrative tasks must necessarily follow the detainee's arrest. Barnes, 793 F. Supp. 2d at 276 (explaining why the administrative burdens in the over-detention context are much lighter than in the probable cause hearing context).

Even in his summary judgment opinion Judge Lamberth did not hold that checking for other cases, warrants, or detainers holding the court return – is not an automatic justification for over-detaining a court return entitled to release. He merely held that "Temporarily retaining custody over an inmate who is entitled to release in order to accomplish administrative tasks incident to that release is not *per se* unconstitutional." Barnes, 793 F. Supp. 2d at 275.

Some jails are able to perform the "warrant" check in as a little as 15 minutes. Jones v. Cochran, 1994 U.S. Dist. LEXIS 20625 at 9.

The District maintains an inmate tracking database that contains all of the person's warrants, detainers, and other cases, and there is nothing in the record to suggest that the DOC could not perform these checks in fifteen minutes before a court return goes to court.

8. **Judge Lamberth actually wrote that "the maximum permissible administrative delay in the overdetention context likely falls *well* short of the 48-hour horizon set out in McLaughlin; Judge Lamberth set the outer time limit at midnight of the date the person was entitled to release; Two to five hours now appropriate."**

The District contends that:

> Additionally, in *Barnes* the plaintiffs asked this Court to impose a bright-line time limit of two and a half hours for the DOC release process. *Barnes*, 793 F. Supp. 2d at 274. The *Barnes* Court expressly declined, finding only that the maximum permissible administrative delay "likely" falls short of the 48 hours horizon set for detentions pending probable cause determinations after warrantless arrests. *Id.* at 275-76.

Memorandum, p. 7.

There are two ideas in play here, the minimum amount of time that can state a constitutional over-detention claim, which is dispositive of the District's motion to dismiss Mr. Jones's over-detention claims, and the maximum amount of time that the District has to make releases of court returns entitled to release, which relates to the class definition.

The District's passage suggests that Judge Lamberth was indicating that the "the maximum permissible administrative delay" was closer to 42 hours than two hours. A careful reading of the passage in Judge Lamberth's summary judgment opinion and the District's

summary of it shows that the District's summary of Judge Lamberth's ruling omits words and the omitted words are legally significant language

The omission of the legally significant words are part of the reason the passage suas quoted suggests other than what Judge Lamberth actually wrote. Whereas the District reports that Judge Lamberth wrote, "the maximum permissible administrative delay "likely" falls short of the 48 hours horizon," Judge Lamberth actually wrote that "the maximum permissible administrative delay in the overdetention context likely falls ***well*** short of the 48-hour horizon set out in *McLaughlin*." Barnes, 793 F. Supp. 2d at 275-76 (emphasis added).

The relevant passage in Judge Lamberth's summary judgment opinion reads:

> In recognition of these facts, courts appear to agree that the maximum permissible administrative delay in the overdetention context likely falls well short of the 48-hour horizon set out in *McLaughlin*. "[E]ven a thirty-minute detention after being ordered released could work a violation of a prisoner's constitutional rights under the Fourteenth Amendment." The Eighth Circuit has held that once a judge orders the release of a prisoner, any continued detention unlawfully deprives the prisoner of his liberty because "the state has lost its lawful authority" to hold him.

Barnes, 793 F. Supp. 2d at 276 (internal citation omitted).

So, in the first sentence of this passage Judge Lamberth was contrasting the maximum permissible administrative delay in the probable cause hearing context (48 hours according to McLaughlin) with the "the maximum permissible administrative delay in the overdetention context." The backdrop to this contrast is that Judge Lamberth was **rejecting** the District's contention that by analogy to McLaughlin it should have 48 hours to make releases. Barnes, 793

F. Supp. 2d at 275-76. *See also* Barnes, 242 F.R.D. 113, 117-18 (rejecting same argument at motion to dismiss stage).

Judge Lamberth also used the phrase "the point at which overdetention becomes presumptively unreasonable is likely to fall well short of the 48-hour window in *McLaughlin*" in his **motion to dismiss** opinion. Barnes, 242 F.R.D. at 118,

The reason that Judge Lamberth rejected the 48 hour McLaughlin rule in the over-detention context is that in the over-detention context the administrative burdens on the government are lighter, *e.g.*, the government has already identified the person, and all they have to do is check for other cases, warrants, and detainers, and in the over-detention context the individual's interest is much greater – "absolute" in fact. Barnes, 242 F.R.D. at 117-18.

The second and third sentences in the summary judgment opinion illustrate Judge Lamberth's point that 48 hours is too long in the over-detention context. The reason is that because the minimum amount of time that states an over-detention claim is as brief as half an hour, the maximum bright line outer limit for making releases (maximum permissible administrative delay) is way shorter than 48 hours.

In fact, in his summary judgment opinion in Barnes Judge Lamberth **did set a bright-line outer time limit of hours** holding that for over-detentions occurring "during the first 16 months of the class period -- September 1, 2005 to December 31, 2006 -- the DOC violated the due process rights of the plaintiffs and the members of the overdetention class who were overdetained during that period by not releasing them by midnight on the day that they were entitled to release. No reasonable juror could find otherwise." Barnes, 793 F. Supp. 2d at 280. So

no matter what time a person was ordered released at court (Superior Court hearings in C 10 ofter run quite late – till 7 or 8 pm), the release deadline was midnight. This means that for court returns entitled to release released in the evening the District had only several hours to release them.

The maximum bright line outer limit for making releases/ maximum permissible administrative delay also has relevance to the certification issue. In their motions for class action treatment in Bynum and Barnes (as in the First Amended Complaint in this case) plaintiffs contended that there is bright-line period of time beyond which an over-detention is presumptively unreasonable, that is midnight on the day on which the person is entitled to be released. See e.g., Bynum v. District of Columbia, 214 F.R.D. 27, 32 (D.D.C. 2003). Plaintiffs pled a bright-line outer time limit so that the over-detention class definition would "set[s] forth general parameters that limit the scope of the class to such a degree that it is administratively feasible for this Court to determine whether a particular individual is a member of the class. Id. at 32. How much time was "bound up with the merits of plaintiffs' claims." Id. at 40.

Judge Lamberth adopted this outer time limit in his summary judgment opinion. Barnes, 793 F. Supp. 2d at 280.

As Judge Kamberth stated in certifying the over-detention class in Bynum, "such a question [the bright-line outer time limit for making releases] is bound up with the merits of plaintiffs' claims." Bynum, 214 F.R.D. at 40. The answer to the question – two hours as Mr. Jones contends, five hours as the D.C. Council has decided – will ultimately be plugged into the class definition if the Constitutional over-detention claim proceeds that far.

The D.C. Council has now set a bright-line outer time limit of 5 hours for court returns and by noon on the date the sentence expires for others. D.C. Code § 24-211.02a(a)(2) and (3).

Mr. Jones maintains that bright-line outer time limit for making releases should be two hours for court returns entitled to release based on the time needed to process releases.

B. Mr. Jones states a claim for a predicate constitutional violation for his procedural due process claim based on liberty interest created by D.C. Code § 24-211.02a(a)(2).

Mr. Jones states a claim for a predicate constitutional violation of his procedural due process claim based on liberty interest created by D.C. Code § 24-211.02a(a)(2).

In Mr. Jones' Claim 2 Mr. Jones alleges that the D.C. Council created a liberty interest by enacting D.C. Code § 24-211.02a(a)(2) which guarantees an inmate ordered released pursuant to a court order (a court return) the right to be released within 5 hours of transfer from the custody of the United States Marshals Service into the custody of the Department of Corrections (unless the inmate has other holds justifying their release). FAC, ¶¶ 154 to 158.

The relevant part of the statute provides: "For an inmate ordered released pursuant to a court order, the inmate shall be released within 5 hours of transfer from the custody of the United States Marshals Service into the custody of the Department of Corrections." D.C. Code § 24-211.02a(a)(2).

The mandatory language in the statute creates a liberty interest in court returns entitled to release. *See e.g.*, Ellis v. District of Columbia, 1995 U.S. Dist. LEXIS 21092, *22 (D.D.C. Mar.

30, 1995)(District of Columbia's regulations on parole use mandatory language like that in the statutes in Greenholtz and Allen, thus creating an expectation of release).

The due process clause entitles a person to some process before the state may deprive them of their liberty interest. The default position for due process is pre-deprivation notice and a pre-deprivation hearing. Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972). The rationale is the best way to prevent substantively unfair and mistaken deprivations of property interests is to give the owner an opportunity to speak up in their own defense, and to make the State listen to what they have to say, before the deprivation occurs. Fuentes, 407 U.S. 81- 82; Armstrong v. Manzo, 380 U.S. 545, 551 (1965)(hearing on motion to set aside adoption decree did not restore father to the position he would have been in had he got pre-deprivation notice and a hearing before the termination of his parental rights).

Here, the District gave Mr. Jones no process. This violates Due Process because however weighty the governmental interest may be in a given case the government may never reduce the amount of "process" to zero. Propert v. District of Columbia, 948 F.2d 1327, 1332 (D.C. Cir. 1991).

Mr. Jones pled in the alternative that "he was held more than five hours before release after being transferred by the Marshals in the courthouse to the DOC transport officers." FAC, ¶ 132. Therefore Mr. Jones states a claim.

The District addressed Mr. Jones' procedural due process claim on pages 7 to 9 of its memorandum of law. Memorandum, pgs. 7-9. The only objections the District raises are that (1) in his summary judgment opinion in Barnes Judge Lamberth refused to impose a bright-line time

limit of two and a half hours for the DOC release process, *Barnes*, 793 F. Supp. 2d at 274; (2) this Court should not accept plaintiff's alternatively pled facts, that is, "Mr. Jones pleads in the alternative that he was held more than five hours before release after being transferred by the Marshals in the courthouse to the DOC transport officers, FAC, ¶ 133; and (3) "[t]emporarily retaining custody over an inmate who is entitled to release in order to accomplish an administrative task incident to that release is not *per se* unconstitutional." Memorandum, p. 7-8.

Oddly enough the District did not challenge that the statute created a liberty interest or that the DOC failed to give Mr. Jones the required pre-deprivation notice.

Therefore, the District waived these objections because arguments raised for the first time in a reply brief are deemed waived. Estate of Gaither v. District of Columbia, 655 F. Supp. 2d 69, 87 n.13 (D.D.C. 2009). "Considering an argument advanced for the first time in a reply brief . . . is not only unfair to an [opponent], but also entails the risk of an improvident or ill-advised opinion on the legal issues tendered." Id. *citing* McBride v. Merrell Dow & Pharm., 800 F.2d 1208, 1211 (D.C. Cir. 1986); Coates v. Wash. Metro. Area Transit Auth., 2016 U.S. Dist. LEXIS 117771, *3 (D.D.C. Aug. 31, 2016).

First, Mr. Jones addresses Judge Lamberth's comment ""the maximum permissible administrative delay in the overdetention context" above, and the same arguments apply here.

Judge Lamberth was discussing the "the maximum permissible administrative delay in the overdetention context," not the minimum delay that can give rise to an over detention claim under the 5th Amendment, which is the issue in this motion to dismiss. Barnes v. District of Columbia, 793 F. Supp. 2d at 276.

But more to the point, this is a procedural due process claim based on the D.C. Council's creation of a liberty interest by enacting D.C. Code § 24-211.02a(a)(2). The D.C. Council set the five hour limit. Mr. Jones is not asking this Court to adopt that limit in this claim, the Council already has.

Second, Mr. Jones addresses the District's objections to Mr. Jones's alternatively pled allegation, FAC, ¶ 133, above, and the same arguments apply here. Anyway, the District's summary of Mr. Jones' allegations omits words from Mr. Jones' alternatively pled allegation and the omitted words are legally significant language. Mr. Jones deserves to have his allegation evaluated on the merits, not on a rewritten version that omits legally significant language.

What the District wrote in its Memorandum was, ""Plaintiff alleges he was overdetained for "several hours" or, in the alternative "that he was held for more than five hours."

What Mr. Jones actually pled in the alternative in the First Amended Complaint was, "Mr. Jones pleads in the alternative that he was held more than five hours before release after being transferred by the Marshals in the courthouse to the DOC transport officers." FAC, ¶ 133. This language tracks the language in D.C. Code § 24-211.02a(a)(2).

Mr. Jones does not allege that his over-detention in toto lasted five hours. He alleged that his over-detention from the point that the R&D staff returned him to his cell lasted "several hours" which, drawing inferences in his favor, lasted at least five hours.

His alternatively pled allegation is that from the period of time from when the courtroom Marshals handed off custody of Mr. Jones' "body" until the time of his eventual release from the DC Jail and DOC custody lasted more "than five hours."

Third, as explained above, especially at the motion to dismiss stage, "[t]emporarily retaining custody over an inmate who is entitled to release in order to accomplish an administrative task incident to that release is not *per se* unconstitutional." But nor is it *per se* constitutional. The time limit involved here was enacted by the D.C. Council and they were entitled to include time for out-processing but they were not obligated to. Young, 249 F.3d at 736. Anyway, the District at this procedural posture can point to no evidence to say that the D.C. Council's five hour deadline does not already accommodate time for "out-processing.'

C. Plaintiff states a claim that the District has a custom, policy, or practice of overdetaining inmates and that the District is deliberately indifferent to the problem.

The party moving for dismissal has the burden of showing that no claim has been stated. 2-12 Moore's Federal Practice - Civil § 12.34 (2016).

A court may not grant a motion to dismiss for failure to state a claim "even if it strikes a savvy judge that . . . recovery is very remote and unlikely." "So long as the pleadings suggest a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief,' a court may not dismiss." Atherton, 567 F.3d at 681 (internal citations and punctuation omitted).

At the motion to dismiss stage the reviewing court must treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged. Atherton, 567 F.3d at 677; Jones, 835 F.3d at 79; Bello v. Howard Univ., 898 F. Supp. 2d 213, 216 (D.D.C. 2012).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

In its discussion of the amount of factual content necessary to show "plausibility," the Iqbal court focused on the word "show" in Rule 8, which requires "a short and plain statement of the claim *showing* that the pleader is entitled to relief." The Court stated that when "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—that the pleader is entitled to relief." Accordingly, the Court seems to be making a distinction between allegations, which merely establish a possibility, and a factual "showing," which need not establish a probability but must at least be sufficient to allow the court to "draw the reasonable inference" of liability. 2-8 Moore's Federal Practice - Civil § 8.04 (2016).

Nonetheless, "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Moreover, there is no heightened pleading standard in the context of the dismissal of a municipality in a 42 U.S.C. § 1983 case. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (heightened pleading for cases against municipalities rejected); Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514–515 (2002).

Most cases granting a motion to dismiss a municipal liability claim against the District involve a plaintiff who pled no facts in support of the Monel claim, or no facts in support of the Monel claim beyond the facts of the predicate incident itself, Sheikh v. District of Columbia, 77 F. Supp. 3d 73, 84-85 (D.D.C. 2015), or the plaintiff omitted facts on a key element of the complaint, such as causation. Blue v. District of Columbia, 811 F.3d 14, 19 (D.C. Cir. 2015).

These cases are distinguishable from Mr. Jones' First Amended Complaint because he pled detailed sufficient facts identifying his deliberate indifference theory and showing the elements of the claim.

There are at least two 12(b)(6) decisions in which Judges of this Court have decided whether plaintiffs successfully pled municipal liability on the part of the District for over-detentions at the motion to dismiss stage, Barnes v. District of Columbia, 242 F.R.D. 113, 115, 118 (D.D.C. 2007), and more recently, Page v. Mancuso, 999 F. Supp. 2d 269, 282 (D.D.C. 2013).

In Barnes v. District of Columbia, 242 F.R.D. 113, 115, 118 (D.D.C. 2007) the Court denied the motion to dismiss. In Page v. Mancuso the Court granted the motion to dismiss but the case is disguisable from this case because plaintiff pled no facts in support of the Monel claim beyond the facts of the predicate incident itself. Page v. Mancuso, 999 F. Supp. 2d 269, 282 (D.D.C. 2013).

In evaluating a motion to dismiss under Rule 12(b)(6) the Court "must first 'tak[e] note of the elements a plaintiff must plead to state [the] claim' to relief, and then determine whether the

plaintiff has pleaded those elements with adequate factual support to 'state a claim to relief that is plausible on its face.'" Blue v. District of Columbia, 811 F.3d 14, 20 (D.C. Cir. 2015).

For his over-detention claims Mr. Jones pled a "deliberately indifferent" theory, that is,

> The critical question here is whether the government has failed "to respond to a need . . . in such a manner as to show 'deliberate indifference' to the risk that not addressing the need will result in constitutional violations." The inquiry is an objective one—the factfinder must ask "whether the municipality knew or should have known of the risk of constitutional violations."

Lightfoot v. District of Columbia, 273 F.R.D. 314, 321 (D.D.C. 2011).

Mr. Jones pled detailed facts showing what his claim was and showing how the facts established the elements of his claim as follows.

> 13. For over 20 years the District has run a jail system that systemically holds people past their release dates and subjects court returns entitled to release to degrading and unnecessary blanket post release strip searches.
>
> 14. The cause of the over-detentions and illegal post release strip searches of court returns entitled to release was and remains the District of Columbia's maintaining a release system in the DOC which *in toto* simply delays all releases until the system, in its sweet time, and with the resources the government of the District of Columbia chooses provide it, is ready to make releases of inmates from DOC facilities.
>
> 15. Regardless of the lawfulness of its release polices the District implements them in a way that violates the constitutional rights of inmates.
>
> The DOC with the full knowledge of the D.C. Council and the Mayor has blindly followed practices that required release dispositions to be transmitted from the Superior Court to the Records Office at the DC Jail in paper format by hand in the first place, and then the District, especially the DOC, "inefficiently implemented" the procedures in the system for transmitting orders from the courtrooms to the Records Office in ways that caused significant delays and losses in the transmission of the orders.

> 18. The DOC's determination to (1) make releases at the DC Jail or and only occasionally at the courthouses[2], and to process releases (2) on the basis of paper orders (as opposed to docket entries or electronically transmitted orders) (3) hand carried back to the Records Office, and the "inefficiently implemented" procedures in the system for transmitting orders added hours and sometimes days to the release process.
>
> 19. The DOC's "inefficient implementation" of its procedures for making releases added further delay. The DOC runs a paper system for tracking cases and releases and misplaces jackets, misfiles orders, and runs the system manually. The "inefficient implementation" of the District's release procedures is the result of official "acquiescence in a longstanding practice or custom which constitutes the standard operation procedure of the local government entity."
>
> 24. The DOC through its Records Office enforces a policy of treating court return (each person who leaves a DOC facility for court and returns on the same day) as subject to their original commitment order if the court return returns to the Jail or other facility without a release order for each case on which they are being held.

Additionally Mr. Jones pled how the DOC operates a “Split system connected by a "sneaker network", that is, the DOC makes releases only on the basis of paper orders hand carried between the courthouses and the DC Jail’s Records Office because the Jail and the courthouses use separate computer systems. FAC, ¶ 39 to 59. The DOC insists on using paper orders to make releases. FAC, ¶ 18, 40, 44, 58.

Further, Mr. Jones pled:

> Despite years of knowing about the problems caused by transmitting papers orders by hand the DOC has refused to engineer a system of electronically transmitting release / commitment data from the courthouses to the Records Office system. FAC, ¶ 51.
>
> The District even refuses to set up a network to link the courtroom computers with the Records Office so that paper orders printed out by the courtroom clerks will print in the Records Office. FAC, ¶ 53.

[2] The allegation that the DOC “only occasionally [makes releases] at the courthouses” is factually inaccurate and Mr. Jones through counsel withdraws this allegation. The First Amended Complaint, ¶ 42, shows that since 2008 the DOC has also made releases from the courthouses.

Further, Mr. Jones pled how the DOC runs a paper system for tracking cases instead of using its database for tracking inmates and their case, warrants, and detainers. FAC, ¶ 56 to 58. The District's Records Office runs the system manually and frequently misplaces jackets, misfiles orders, and fails to process commitments and releases reliably. FAC, ¶ 59.

The District's system for handling court returns still maintains many of the same errors that have plagued it for years. FAC, ¶ ¶ 60 to 104.

As part of the Bynum Settlement the District addressed some of these problems by agreeing to divert court returns entitled to release to a processing facility outside the DC Jail, the Medical Holding Unit or "MHU ," where they could stay while the Records Office processed their entitlement to release to avoid burdening the DC Jail with the flow of court returns entitled to release (which affected the Records Office's capacity to process all releases) and so court returns entitled to release would not have to undergo strip-searches. FAC, ¶ 72.

The DOC also agreed to build a new Inmate Processing Center outside the DC Jail to process releases of court returns entitled to release so they would not have to reenter the DC Jail for out-processing. FAC, ¶ 73.

The DOC never built the Inmate Processing Center. FAC, ¶ 74. The DOC began making courthouse releases and releases from MHU instead of returning all court returns back to the DC Jail for release. FAC, ¶ 75 to 80. But, by 2013 problems with releasing court returns entitled to release from the courthouses or MHU had returned. FAC, ¶ 81.

Mr. Jones pled a detailed analysis of how the DOC over-detained a court return entitled to release named Mr. Smith for over 29 days and how the problems detailed above caused the

over-detention, and how the District's over-detention of Mr. Smith and its response to his over-detention illustrate the District's deliberate indifference to the rights of inmates to timely releases, and how these problems cause the over-detentions. FAC, ¶ 82-104.

These allegations are not just a citation to a single over-detention. They "illustrates the problems caused by the split system and its reliance of paper records which caused the overdetentions and strip-searches of Mr.Jones and the class members as well as the over-detention and strip-search of Mr. Smith." FAC, ¶ 82.

Mr. Jones also pled detailed allegations showing the District's deliberate indifference to over-detentions. FAC, ¶ 105 to 126. He pled detailed allegations about over-detentions in the DOC and how they compare to over-detentions in the Los Angeles County Jail, a much larger system with relatively few over-detentions for the last two years for which figures are publically available. Id.

Finally, Mr. Jones pointed to concrete facts such as publically available figures and discussions with knowledgeable people such as CJA lawyers which show that the DOC routinely over-detentions prisoners including court returns entitled to release. FAC, ¶ 117 to 134.

These facts satisfy Mr. Jones's pleading requirements for each of his constitutional over-detention claims under Twombly and Iqbal as construed by the District of Columbia Circuit and this Court. Blue v. District of Columbia, 811 F.3d 14, 20 (D.C. Cir. 2015); Lightfoot v. District of Columbia, 273 F.R.D. 314, 320-21 (D.D.C. 2011).

Mr. Jones's well pled facts show the elements of his claim. Barnes v. District of Columbia, 242 F.R.D. 113, 115, 118 (D.D.C. 2007).

His case is thus distinguishable from Page v. Mancuso, 999 F. Supp. 2d 269, 282 (D.D.C. 2013). In Page the only facts plaintiff pled in support of his Monel claim were the facts of the predicate incident itself.

The District's objections to Mr. Jones's Monel claim.

The District's main argument for granting its motion to dismiss on the Monel claim for over-detentions is that, "[t]emporarily retaining custody over an inmate who is entitled to release in order to accomplish an administrative task incident to that release is not per se unconstitutional." Memorandum, p. 8. The arguments in opposition to Mr. Jones's predicate 5th Amendment over-detention claim. Memorandum, p. 8-10.

Mr. Jones addressed these arguments in detail above.

The District also challenges the sufficiency of Mr. Jones' allegations.

The District says, "The Complaint does not provide *any* factual allegations which, if true, could prove the District had actual or constructive knowledge that plaintiff's constitutional rights would be violated if he was returned to the jail while DOC processed his release." Memorandum, p. 12. Au contraire. Mr. Jones pled that the problems with over-detaining court returns entitled to release have been known to the District for almost 20 years in the Bynum and Barnes cases and through its knowledge of over-detentions and its knowledge of the DOC's release practices.

Mr. Jones allegations cited above show that the District's antiquated paper driven release system and the other problems he identified are the moving force behind Mr. Jones's over-detention and the over-detentions of the other class members.

The reviewing court should construe a plaintiff's allegations liberally, because the rules require only general or "notice" pleading, rather than detailed fact pleading. For example, provided that a pleading states a claim for relief under the plausibility standard, it is not necessary for the pleading to also rebut other possible explanations for the conduct alleged, even if those alternatives might appear to be more likely. Jones v. Kirchner, 835 F.3d at 79–80 (plaintiff stated plausible Fourth Amendment claim for failure to knock-and-announce by pleading that he did not hear any knock or announcement; not necessary to plead additional facts to rebut possibility that knock-and-announce occurred, but was simply not heard by plaintiff).

II. Mr. Jones states a common law over-detention claim.

Mr. Jones states a common law over-detention claim for false imprisonment in the substantive allegations of Claim 3.

In the heading to Mr. Jones' Claim 3 he mistakenly refers to the claim as "false arrest." But, the operative language of the claim states, "The District of Columbia, and its agents and employees, held Mr. Jones and the over-detention class members past the time they were entitled to release." FAC, ¶ 166.

Omitting or misstating the legal theory for a claim is inconsequential to whether the pleading states a claim for relief under Rule 12(b)(6) provided that the factual allegations underlying a claim are sufficient under the plausibility standard of Twombly and Iqbal. 2-12 Moore's Federal Practice - Civil § 12.34 (2016); Johnson v. City of Shelby, 574 U.S. —, 135 S. Ct. 346, 190 L. Ed. 2d 309, 309 (2014) (per curiam) (federal pleading rules "do not countenance

dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"); Brown v. Sessoms, 774 F.3d 1016, 1022 (2014).

A complaint need not point to the appropriate statute or law to raise a claim for relief; a complaint sufficiently states a claim even if it points to no legal theory or even if it points to the wrong legal theory, as long as "relief is possible under any set of facts that could be established consistent with the allegations." Tolle v. Carroll Touch, Inc., 977 F.2d 1129, 1134 (7th Cir. 1992).

The District ignores the language of the operative allegations and focuses on the heading. Memorandum, pgs. 16-17. But, "The defendant had notice of the claims against it because the plaintiffs "stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city."" Brown v. Sessoms, 774 F.3d 1016, 1022 (2014).

The District then argues that, "Simply put, there are no factual allegations anywhere in the Complaint to support a false arrest claim." Memorandum, p. 17. Plaintiffs do not concede that when the DOC transport officers laid hands on Mr. Jones and they took custody of him from the courtroom Marshals they did not effect a common law arrest. *See* e.g., Barnes, 242 F.R.D. at 118 (plaintiffs' allegations of Fourth Amendment violations are sufficient to survive a motion to dismiss).

But, a more elegant solution to this claim is to analyze it under the substantive allegations of the claim rather than the style of the claim. FAC, ¶ 166.

There are allegations in Claim 3 that support a claim for false imprisonment under both general common law principles and the District of Columbia common law. FAC, ¶ 166.

1. The common law elements of the tort of false imprisonment.

The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process.* Wallace v. Kato, 549 U.S. 384, 389 (2007).

The District contends that "The elements of a common law false arrest claim and a constitutional false arrest claim are practically identical." Memorandum, p. 16. This is not a careful statement of the law of false imprisonment in the District of Columbia under the facts of this case – there are "refinement[s] to be considered, arising from the common law's distinctive treatment of the torts of false arrest and false imprisonment." Wallace v. Kato, 549 U.S. 384, 388 (2007).

At common law, although false arrest and false imprisonment overlap, nonetheless false arrest and false imprisonment are two distinctive torts. Wallace, 549 U.S. at 388. The former is a species of the latter. Id. "Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets; and when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is." Wallace, 549 U.S. at 388-89. Recently the Supreme Court changed the law stated in Wallace v. Kato with respect to whether an arrestee may challenge his pretrial detention on Fourth Amendment grounds holding that the Fourth Amendment governs unlawful pretrial detention claims even after legal process begins. Manuel v. City of Joliet, 137 S. Ct. 911 (2017). But, the case does not affect the Court's observations in Wallace v. Kato about false imprisonment.

The Restatement of Torts, 2d, also defines the tort of false imprisonment this way:

> (1) An actor is subject to liability to another for false imprisonment if
>
> (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
>
> (b) his act directly or indirectly results in such a confinement of the other, and
>
> (c) the other is conscious of the confinement or is harmed by it.
>
> (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

Restat 2d of Torts, § 35 (2nd 1979).

Under the Restatement, malice is not an element of the tort of false imprisonment. “If an act which causes another's confinement is done with the intention of causing the confinement, the actor is subject to liability although his act is not inspired by personal hostility or desire to offend.” Restat 2d of Torts, § 44 (2nd 1979).

2. The District of Columbia common law elements of the tort of false imprisonment.

The only two elements of the tort of false imprisonment under the common law of the District of Columbia "are (1) the detention or restraint of one against his will, within boundaries fixed by the defendant, and (2) the unlawfulness of the restraint." Faniel v. Chesapeake & Potomac Tel. Co., 404 A.2d 147, 150 (D.C. 1979)(false imprisonment is "the restraint by one person of the physical liberty of another without consent or legal justification.").

The District of Columbia Court of Appeals has held that "we are satisfied that neither malice nor wrongful intent are controlling considerations in an action for false arrest or false imprisonment, and that such allegations, insofar as they refer to false arrest or false imprisonment, are mere surplusage." Clarke v. District of Columbia, 311 A.2d 508, 511 (D.C. 1973).

The DOC corrections officers held Mr. Jones in their custody and in the DC Jail after a District Court Judge ordered his release, *see* FAC, ¶ 166, and this conduct constituted false imprisonment under the common law of the District of Columbia. Faniel, 404 A.2d at 150. Mr. Jones is not required to plead or prove the element of malice. Clarke, 311 A.2d at 511.

3. The District is liable for the conduct of its agents in falsely imprisoning Mr. Jones because of the doctrine of *respondeat superior*.

The District is liable for the conduct of its agents in falsely imprisoning Mr. Jones because of the doctrine of *respondeat superior*. The District of Columbia may be sued under the common law doctrine of *respondeat superior* even for the intentional torts of its employees acting within the scope of their employment. Wade v. District of Columbia, 310 A.2d 857, 863 (D.C. 1973) (*en banc*). Mr. Jones pled that the District's agents were acting within the scope of their employment at all times, FAC, ¶ 167, and that their conduct was the proximate cause of his and the other class members' injuries. FAC, ¶ 169.

III. The Strip-Searches Violated the 4th and 5th Amendments.

"[I]n considering whether a plaintiff has stated a claim for municipal liability, the district court must conduct a two-step inquiry. First, the court must determine whether the complaint

states a claim for a predicate constitutional violation. Second, if so, then the court must determine whether the complaint states a claim that a custom or policy of the municipality caused the violation." Sheikh, 77 F. Supp. 3d at 84 *citing* Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003).

Mr. Jones satisfies both of these steps as described below for both of his Constitutional strip-search claims. Bame v. Dillard, 637 F.3d 380, 384 (D.C. Cir. 2011) is not relevant to the case because it is a qualified immunity decision and the Bame Court held that the constitutional right was not clearly established without reaching the question of "whether in fact there is such a right." In a similar case Judge Rogers concurred writing, "I write principally because this court, as in ten other circuits, should "clearly establish[]" that indiscriminate strip searching of individuals awaiting presentment on non-violent, non-drug offenses who are not held in the general population is unconstitutional under the Fourth Amendment to the United States Constitution in the absence of reasonable suspicion an individual possesses contraband or weapons. Johnson v. Gov't of the Dist. of Columbia, 734 F.3d 1194, 1205 (2013)(Rogers, J. concurring)(internal citation omitted).

A key fact is that instead of returning Mr. Jones to the DC Jail the DOC could have released him from the courthouse or diverted him to MHU where court returns are not strip-searched. FAC, ¶ 35; ¶ 37, ¶ 146.

1. **There are two ways to analyze the strip-search claim, as court return strip-searches or under the Florence exception.**

There are two ways to analyze the strip-search claim, as court return strip-searches under Bynum and Barnes or under the Florence exception. And both ways compel the conclusion that the DOC strip-search policy of strip-searching all prisoners who enter the DC Jail whether they have been ordered released violates the Constitutional rights of Mr. Jones and the other class members.

DOC transport officers transported Mr. Jones and the other class members ordered released at their court hearings back to the DC Jail for out-processing in the DC Jail or CTF instead of releasing them at the courthouse or diverting them to the "MHU" (the Medical Holding Unit of the DC Jail), the DOC facility set up by the DOC pursuant to the Bynum Settlement to hold court returns ordered released at their court hearings while the DOC administratively processes their release from DOC custody. FAC, ¶ FAC, ¶ 33-34. Mr. Jones and other members of the class along with all persons booked at the DC Jail are subjected to degrading and humiliating blanket (i.e., "suspicionless" strip-searches administered to all intakes) strip searches conducted in the R&D (Receiving and Discharge) areas as part of the booking process. FAC, ¶ 35. Persons detained in MHU are not subjected to blanket strip-searches. FAC, ¶ 41. 1.

Suspicionless strip-searches violate the 4th Amendment. A strip-search must be reasonable under the 4th Amendment. Bell v. Wolfish, 441 U.S. 520, 559 (1979); Barnes v. District of Columbia, 793 F. Supp. 2d 260, 287 (D.D.C. 2011). Bell v. Wolfish articulated a test for constitutionality of strip searches as a balance between the necessity for the particular search against the invasion of personal rights that the search entailed. Bell, 441 U.S. at 559. This test

requires courts to weigh "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.

This Court found on a full record at summary judgment that there is no penological justification for subjecting court returns entitled to release to blanket strip-searches. Barnes, 793 F. Supp. 2d at 289. Moreover,

> the strip search class members are subjected to strip searches solely due to the fact that the DOC has made the unfortunate choice to bring them back into the general inmate population while the Records Office processes their releases, rather than temporarily housing them apart from that population. That choice creates the security problem that the DOC's strip searches are designed to solve.

Id.

2. Court return strip-searches.

These searches are the same court return strip-searches this Court held violated the 4th Amendment in Barnes, 793 F. Supp. 2d at 290. The strip-search plaintiffs in Barnes were persons held pretrial in the DC Jail or CTF who had gone from the DC Jail or CTF to Superior Court or District Court for court events, been ordered released or had otherwise become entitled to release (*e.g.*, their cases were dismissed by the prosecutor) and returned to the DC Jail and subjected to the intake strip-searches while their releases were being processed. Thus, this Court held that the case was distinguishable from the intake strip-searches of pre-presentment arrestees held in a jail pending presentment. "The assumption in those cases is that jails are processing new inmates into the general population, and have determined that maintaining adequate security in that population requires a policy of blanket strip searches." Barnes, 793 F. Supp. 2d at 289.

The Barnes Court applied the Bell balancing test to the court return strip-searches and found that the strip-searches were not justified by a security need and so they violated the 4th Amendment.

The invasions in this case are particularly suspect given that they are happening to persons who are no longer prisoners in the eyes of the law, who are not individually suspected of carrying contraband, and who are entitled to a restoration of the rights they enjoyed prior to their imprisonment. And the DOC's invasion of their personal rights is balanced against nothing, because the DOC's blanket strip searches of court returns entitled to release are needless, a product of the DOC's insistence on maintaining a policy that subjects free men and women to degrading treatment when reasonable alternatives such as courthouse release and MHU are readily available. Barnes, 793 F. Supp. 2d at 290.

As Judge Feinerman of the Northern District of Illinois, Eastern Division, wondered in a similar court return over-detention/ strip-search case, "why send an unescorted free man into the general population of Cook County Jail?" Shultz v. Dart, 2013 U.S. Dist. LEXIS 156546, at *9 (N.D. Ill. Oct. 31, 2013).

Mr. Jones was in the exact same position as the Barnes strip-search plaintiffs. He was not held on the basis of probable cause or reasonable suspicion to believe that an offense had been committed and he had committed it. The opposite in fact was true – a judicial officer had ordered his release.

The mere possibility that another warrant was in existence does not qualify as a particularized suspicion justifying the DOC strip-search policy, Jones v. Cochran, 1994 U.S.

Dist. LEXIS 20625 (S.D. Fla. 1994), when reasonable alternatives such as courthouse release and MHU are readily available. Barnes, 793 F. Supp. 2d at 290.

But, to add insult to injury to their over-detentions, instead of holding them in the MHU or some other "readily available" reasonable alternative place where they would not be strip-searched, the government put them back in DC Jail or CTF where they were sure to be strip-searched because of the policy of strip-searching all intakes into the DC Jail's intake center, R&D.

3. Intake strip-searches under the "Florence exception."

The strip searches in this case could also be analyzed under the "Florence exception" of Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) because Mr. Jones and the other class members were in the position of arrestees arrested on minor offenses who were still awaiting their probable cause hearings, because they had actually been ordered released, and so there was no probable cause or suspicion to hold them on any offense.

In Florence the Supreme Court addressed the case of a person arrested on a warrant and strip-searched before being placed in the general population sections of two jails which did not have any place to hold people outside the general population. However, the Court's following statement in the majority opinion is key to determining the outcome of this motion to dismiss:

> The circumstances before the Court, however, do not present the opportunity to consider a narrow exception of the sort … which might restrict whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here.

Florence, 132 S. Ct. at 1523.

Concurring, Justice Alito emphasized the limits of the Court's holding and wrote that, for minor offenders, "admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an alternative procedure is feasible." *Id.* at 1524 (Alito, J., concurring).

As Judge Walton of this Court recently pointed out,

> One member of this Circuit has afforded particular weight to the exceptions articulated in Florence, remarking that "six Justices of the Supreme Court have expressed unease with the type of indiscriminate strip searching . . . that is challenged here." Johnson v. District of Columbia, 734 F.3d 1194, 1206, 407 U.S. App. D.C. 152 (D.C. Cir. 2013) (Rogers, J., concurring in part and concurring in the judgment) (challenge to District of Columbia Superior Court cellblock's policy of subjecting "all incoming detainees" to strip search, including "pre-presentment arrestees charged with nonviolent, non-drug offenses").

Lewis v. Gov't of the Dist. of Columbia, 195 F. Supp. 3d 53, 64 (D.D.C. 2016).

In Lewis, plaintiffs were arrestees who were presented in Superior Court for their initial appearances on minor offenses who had been ordered held on 24 hour "Gerstein Perfection" holds because the "Gersteins" (arresting officer's sworn probable cause statements) the government offered to justify their arrests did not establish probable cause. Lewis, 195 F. Supp. 3d at 56-57. The DOC transported them to the DC Jail and housed them there instead of returning them to Central Cell Block (where they had been held pending presentment). As a result, plaintiffs were subjected to the same degrading strip-searches to which the DOC subjected Mr. Jones when they were committed to the DC Jail.

Plaintiffs alleged that the "Florence exception" applied to their strip-search claims because the Superior Court judicial officers who ordered them held had effectively affirmatively made findings of no probable cause in their cases by finding that the "Gersteins" did not

establish probable cause, and there were alternatives to holding them in the general population of the DC Jail. Although Judge Walton questioned this characterization of the judicial officer's rulings, Judge Walton did rule that no affirmative findings of probable cause were made during the plaintiffs' initial appearances. Lewis, 195 F. Supp. 3d at 65 n.8.

Judge Walton ruled that the "Florence exception" applied because there was no finding of probable cause and "there were other readily available facilities removed from the general population of the DC Jail in which [the plaintiffs] could have been held." Lewis, 195 F. Supp. 3d at 64-65.

Other Courts have reached the same result. *See e.g.,* Holland v. City of San Francisco, 2013 U.S. Dist. LEXIS 34294, *22 (N.D. Cal. Mar. 11, 2013)(after Florence, a strip search of a detainee charged with a minor offense who has not yet appeared before a magistrate is permissible if: (1) the detainee cannot be held apart from the general jail population; or (2) the officer directing the search has a reasonable, individualized suspicion that the arrestee is carrying contraband).

Thus Claim 3 falls into the exception in Florence and into the class of cases Justice Alito had in mind when he stated in his concurring opinion, in pertinent part, "the Court does not hold that it is always reasonable to conduct a full strip search of an arrestee whose detention has not been fully reviewed by a judicial officer and who could be held in available facilities apart from the general population." Florence, 132 S. Ct. at 1524, Alito, J.; Holland, 2013 U.S. Dist. LEXIS 34294, *22, concurring (emphasis in original). In fact this case is even stronger than the "Florence exception" because whereas the "Florence exception" has two elements: (1) the arrestee's detention has not yet been reviewed by a judicial officer, and (2) the arrestee can be

held apart from the general population," Florence, 132 S. Ct. at 1523 (emphasis in original), in this case the judicial officer ordered the person's release, and the arrestees could have been released at the cthe or sent to MHU. In fact, many of the class members were, like Mr. Jones, released the same day or the next day still without a finding of probable cause by a judicial officer.

4. Strip-searches violate the 5th Amendment.

Mr. Jones's also states a 5th Amendment claim for the strip-searches at the motion to dismiss stage. Velarde v. Cnty. of Alameda, 2016 U.S. Dist. LEXIS 53110, at *5 (N.D. Cal. Apr. 20, 2016).

5. Mr. Jones states a Monel claim on the strip-searches because the DOC conducted the strip-searches pursuant to an official DOC policy.

Mr. Jones states a Monel claim on the strip-searches because the DOC conduced the strip-searches pursuant to an official DOC policy. Mr. Jones pled that the DOC implemented the strip-searches pursuant to an official DOC policy. FAC, ¶ 160-163. Because that policy was promulgated by an official with final authority to establish such policies for the District and caused plaintiffs' and class members' constitutional deprivations, the District is liable. Barnes, 793 F. Supp. 2d at 291.

Monell established that alleging that a municipal policy or ordinance is itself unconstitutional is always sufficient to establish the necessary causal connection between the municipality and the constitutional deprivation, because an employee's act of enforcing an unconstitutional municipal policy may be considered the act of the municipality itself. Monell v.

Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 125 (2d Cir. 2004).

IV. Mr. Jones States a Claim on His Invasion of Privacy Claim for the District's Strip-Search Policy.

Mr. Jones' Claim 5 states a claim on his invasion of privacy claim under the common law of the District of Columbia. Helton v. United States, 191 F. Supp. 2d 179, 180 (D.D.C. 2002).

The Helton plaintiffs were five women who were arrested for unlawful entry in connection with an "anti-fur" demonstration at the Neiman Marcus store at Mazza Gallerie Mall and subjected to intake "strip and squat searches" in the cellblock at the District of Columbia Superior Court where they were brought for initial appearances. Helton, 191 F. Supp. 2d at 180. The women brought an FTCA claim against the United States. The government moved to dismiss.

Judge Bates analyzed plaintiffs' claims under the District of Columbia common law "intrusion upon seclusion" prong of the invasion of privacy tort under Wolf v. Regardie, 553 A.2d 1213, 1216-17 (D.C. 1989). Helton, 191 F. Supp. 2d at 181.

> [The Court] concludes that under District of Columbia law plaintiffs have stated a claim for intrusion upon seclusion based on their allegations of a strip and squat search ordered by the Marshals Service. Particularly in light of Section 652B of the Restatement, specifically relied upon by the court in Wolf, this Court concludes that the District of Columbia courts would find that the alleged strip search of plaintiffs satisfies the elements of the tort of an intrusion upon seclusion.

Helton, 191 F. Supp. 2d at 182.

Judge Bates held that plaintiffs could show that the alleged strip and squat search conducted by the Marshals Service visually invaded or interfered with their "interest" in remaining clothed and shielding their naked bodies from others where plaintiffs have secluded their naked bodies within their clothes and it was clear that a strip search can be humiliating and degrading. Helton, 191 F. Supp. 2d at 182. Cf. District's Memorandum, p. 17.

The District is liable for the conduct of its agents in strip-searching Mr. Jones because of the doctrine of *respondeat superior*. The District of Columbia may be sued under the common law doctrine of *respondeat superior* even for the intentional torts of its employees acting within the scope of their employment. Wade, 310 A.2d at 863. Mr. Jones pled that the District's agents were acting within the scope of their employment at all times, and that their conduct was the proximate cause of his and the other class members' injuries. FAC, ¶¶ 173-74.

The District contends that this claim fails because "plaintiff failed to even allege that the strip search was offensive to him." Memorandum, p. 17. Wrong. Mr. Jones described the strip-search in detail and pled that "suffered damages as a result" of the strip-search. FAC, ¶ 135-145.

Relief Requested.

For the reasons stated above the District's Motion [17] to Dismiss Plaintiff's First Amended Complaint [12] should be denied.

Respectfully submitted, /s/ William Claiborne William Claiborne D.C. Bar # 446579 717 D Street, N.W	Respectfully submitted, /s/ Lynn E. Cunningham Lynn E. Cunningham D.C. Bar # 221598 306 Westview Drive

Suite 300 Washington, DC 20004 Phone 202/824-0700 Email claibornelaw@gmail.com	P.O. Box 1547 Dubois, WY 82513 Phone 307/431-4158 Email lcunningham@law.gwu.edu

Counsel for Mr. Jones on behalf of himself and the putative class members