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Plaintiff-Appellant's Replacement Reply Brief

Anjana Malhotra

Robert Chang

Fred T. Korematsu Center for Law and Equality

Ronald A. Peterson Law Clinic

No. 10-35917

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTE HOISINGTON,

Plaintiff-Appellant,

v.

ROBIN WILLIAMS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington at Tacoma
No. CV-09-05630-RJB

PLAINTIFF-APPELLANT'S REPLACEMENT REPLY BRIEF

Anjana Malhotra
Robert S. Chang
Lorraine K. Bannai
William Witherspoon, certified law student
Yurij Rudensky, certified law student
RONALD PETERSON LAW CLINIC
Civil Rights Amicus Clinic
Seattle University School of Law
1215 E. Columbia Street
Seattle, WA 98122-4340
Telephone: 206.398.4130
Facsimile: 206.398.4136

Court-Appointed Pro Bono Counsel for
Plaintiff-Appellant

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PRELIMINARY STATEMENT

Monte Hoisington ("Hoisington") should not be forced to subject himself to unconstitutional treatment in order to receive necessary medical care unavailable in the Special Commitment Center ("SCC") on McNeil Island, Washington, where he is civilly detained. By requiring strip and visual body cavity searches before and after off-island transport and full restraints during transport, past and current officials of Washington State's Department of Social and Health Services ("DSHS"), which operates the SCC, and the Department of Corrections ("DOC") (collectively "Defendants") have chosen to inflict unnecessary, degrading, and unreasonable procedures on civil detainees when readily available alternatives exist that satisfy security concerns and do not burden institutional resources.

Rather than consider the sufficiency of these ready alternatives and the invasive nature of their chosen procedures and their destructive effect on the SCC's treatment environment, Defendants ignore the existence of alternative security measures and argue that this Court should simply defer to their stated judgment about the necessity of strip and visual body cavity searches and full restraints. In taking this position, Defendants disregard the less intrusive search procedures that they themselves developed and instituted after a court order fourteen years ago forced Defendants to abandon routine strip searches of civil

detainees following contact visits. Hoisington has presented uncontroverted evidence that less intrusive search procedures could be used as effectively before and after off-island transport without infringing on Hoisington's liberty and privacy interests.

When reviewed de novo, *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), with the evidence viewed in the light most favorable to, and inferences drawn in favor of, Hoisington as the non-prevailing party, *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010),[1] the lower court's grant of summary judgment is inappropriate for the following reasons:

(1) The court committed reversible error by granting summary judgment to Defendants without addressing Hoisington's Fourteenth Amendment substantive due process claim. Though Defendants assert, without citation to authority, that it is improper for a search to be examined under the Fourteenth Amendment, this Court did exactly that as recently as 2011. *See Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1139-41 (9th Cir. 2011) (en banc) (strip search challenged by pretrial detainee as punitive and unreasonable examined under both Fourteenth Amendment substantive due process clause and Fourth Amendment). Hoisington

[1] Contrary to Defendants' argument, *Christian Legal Soc'y Chapter of Univ. of Calif. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) is inapposite as Hoisington sufficiently contested the district court's factual and legal findings throughout his replacement opening brief. Rep.Ans.Br. 5

has offered uncontroverted evidence that the policy applied to him is identical to that applied to prisoners, creating the presumption of punitiveness. The uncontroverted existence of less intrusive search procedures that would accommodate his rights at *de minimis* cost to valid civil commitment interests demonstrates that Defendants' policies do not bear a reasonable relationship—and instead reflect an exaggerated response—to otherwise legitimate security concerns. Defendants have violated Hoisington's clearly established Fourteenth Amendment right as a civil detainee to be free from punitive conditions of confinement.

(2) Subjecting Hoisington to strip and visual body cavity searches violates his clearly established Fourth Amendment right to be free of unreasonable searches and seizures. Given the invasiveness of body cavity searches, weighed against the fact that residents like Hoisington are maintained in a secure environment and subject to constant guard during off-island trips, this Court requires individualized reasonable suspicion before a civil detainee can be subjected to a strip and visual body cavity search. In the alternative, even if individualized reasonable suspicion is not required, material issues of fact exist with regard to the determination of reasonableness under *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), making summary judgment inappropriate.

(3) Though the court below did not reach this question, Defendants

erroneously assert that summary dismissal of Hoisington's damages claims against Defendants in their personal capacities is appropriate based on qualified immunity. However, qualified immunity does not shield Defendants from liability for damages because Hoisington has sufficiently alleged violations of his clearly established rights under the Fourteenth and Fourth Amendments. From previous litigation that resulted in a nearly 13 year court-supervised remedial injunction, the Defendants were well aware of this clearly established constitutional right of SCC residents to be free from punitive conditions of confinement and that unreasonable strip searches of civil detainees violate their Fourth Amendment rights.

(4) To the extent, as claimed by Defendants, that the court below dismissed *all* claims against the SCC and DOC officials based on the Eleventh Amendment, this constitutes error.

Although detained indefinitely, Hoisington is not a prisoner. Though prison-like, the SCC is not a prison. The Supreme Court and this Court have made clear that civil commitment cannot be punitive. Upholding the grant of summary judgment to Defendants would take us another clear and unconstitutional step toward treating Hoisington more like a prisoner and making the SCC more like prison. For the reasons we present, the grant of summary judgment must be overturned.

ARGUMENT

I. Subjecting Hoisington to Strip and Visual Body Cavity Searches and Full Restraints During Off-Island Transport Violates his Clearly Established Fourteenth Amendment Right Not to Be Punished.

A. The District Court Erred in Failing to Address Hoisington's Fourteenth Amendment Substantive Due Process Claims.

Hoisington challenged the SCC and DOC transportation policy which mandated strip and visual body cavity searches and full restraints as punitive under the Fourteenth Amendment and the strip and visual body cavity searches as unreasonable under the Fourth Amendment. ER 251. This Court has recognized that strip searches of pretrial detainees may be punitive under the Fourteenth Amendment and/or unreasonable under the Fourth Amendment. *Byrd*, 629 F.3d at 1139-41 (strip search challenged by pretrial detainee as punitive and unreasonable examined under both Fourteenth Amendment due process clause and Fourth Amendment). *Cf. Bell*, 441 U.S. at 561-62, 558-60.[2] Like an individual accused but not convicted of a crime, civil detainees have a clearly established right under the Fourteenth Amendment to not be "subjected to conditions that 'amount to

[2] Though the Supreme Court recently examined the reasonableness of strip searches of a pretrial detainee under the Fourth Amendment as applied to states under the Fourteenth Amendment, searches in that case were not challenged as punitive under the Fourteenth Amendment substantive due process clause. *See Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington,* 132 S.Ct. 1510 (2012).

punishment.'" *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 536).[3]

Because Hoisington claimed that the policies were punitive in violation of his Fourteenth Amendment rights, the district court erred in adopting the magistrate's report and recommendation, which addressed his Fourth Amendment challenge but failed to address his Fourteenth Amendment challenge. ER 9-19; *see Frost v. Symington*, 197 F.3d 348, 354 (9th Cir. 1999) (error when district court's summary order considered pro se plaintiff's First Amendment claim but failed to address Fourteenth Amendment claim).

B. Defendants' Policies Violate Hoisington's Clearly Established Rights Under the Fourteenth Amendment Substantive Due Process Clause to Be Free From Punitive Conditions of Confinement.

Hoisington's clearly established right under the Fourteenth Amendment to be free from punishment was violated by the blanket strip and visual body cavity searches and full restraints employed when he was transported off-island to receive necessary medical care. A civil detainee has a clearly established right to more

[3] Though Defendants are correct that strip searches of civil detainees have been examined under the Fourth Amendment, Defendants cite no authority—and disregard *Byrd* despite citing earlier to the very page in *Byrd* where this Court undertakes its substantive due process analysis—when they conclude it is *improper* to review strip searches under the Fourteenth Amendment. Replacement Answering Brief ("Rep.Ans.Br.") at 21-22 (citations omitted); *id*. at 18 (citing *Byrd*, 629 F.3d at 1340).

considerate treatment and conditions of confinement than a prisoner and may not be punished. *Jones*, 393 F.3d at 931-32. A presumption of punitiveness arises when a civil detainee "is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held." *Id*. at 932 (citing *Sharp v. Weston*, 233 F.3d 1166, 1172-73 (9th Cir. 2000)). Punitive conditions can also be shown where a challenged restriction is (1) expressly intended to punish; (2) "excessive in relation to [its non-punitive] purpose"; or (3) "employed to achieve objectives that could be accomplished in so many alternative and less harsh methods." *See Jones*, 393 F.3d at 932 (citations omitted).[4]

Prior to transportation off-island, the DOC subjected all SCC residents to the *same* invasive strip search procedures *used on prisoners in DOC custody*. ER 104. Under the watch of DOC correctional officers, Hoisington was required to strip, lift his genitals, bend over, and spread his buttocks. ER 252. During transportation, the DOC subjected Hoisington to the same harsh restraint techniques used on prisoners. ER 104. Upon return, SCC staff subjected him to the same invasive strip search procedures. ER 254. Subjecting civil detainees to the same procedures as

[4] Defendants apply incorrect test in attempting to rebut Hoisington's Fourteenth Amendment substantive due process claim by applying *Bell's* Fourth Amendment test against unreasonable searches, Rep.Ans.Br. at 26-29 (citing *Bell*, 441 U.S. at 559), instead of *Bell*'s due process test, 441 U.S. at 561.

those used on prisoners creates the presumption of punitiveness. *Jones*, 393 F.3d at 932.

Defendants seek to justify their blanket policy based on concerns about security and contraband. Though maintaining security and reducing contraband are legitimate non-punitive objectives, the institution's security and contraband concerns and the actual risks presented by particular civil detainees must be accurately assessed. Hoisington is in a secure environment at all times prior to his departure and has no opportunity to obtain contraband while off-island. ER 8 (full restraints during transportation, held in a separate compartment on ferry, and accompanied by armed guards at all times, even during medical procedures). Further, he has never assaulted SCC staff, possessed contraband, or tried to escape. ER 9.

Hoisington has presented evidence that the means chosen are punitive under *Jones* and *Bell* because they are excessive in relation to the SCC's actual security and contraband concerns and those same concerns can be satisfied through readily available, less harsh methods. *See Jones*, 393 F.3d at 934; *Bell*, 441 U.S. at 561 (punitiveness turns on whether challenged regulations "are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose"). The existence of ready alternatives to strip and visual

body cavity searches – a metal detector, a body-scanning x-ray machine already in use at the SCC, and pat-down searches – is uncontroverted. ER 58. With strip and visual body cavity searches following contact visits prohibited by an earlier (now terminated) court order,[5] the SCC has addressed its concerns about security and contraband by instituting a policy requiring residents to go through a metal detector before each contact visit and metal detector and body scan after the visit. ER 33, 58 (citing Washington Department of Social and Health Service Center, *Special Commitment Center Personal Visiting Policy 220*, at 7, XII(A), 1992, *available at* http://dshs.wa.gov/pdf/SCC/Manuals/p220.pdf) (last visited May 3, 2012)). Defendants do not explain why SCC residents cannot be screened by metal detector and body scanning x-ray machines during off-island visits. Nor do they explain why thorough pat-down searches, an alternative DOC search policy used when a strip search room is unavailable, cannot be used on residents.

Instead, Defendants have chosen to employ unnecessary, humiliating, degrading procedures identical to those used on prisoners. Defendants have failed to rebut the presumption that use of these procedures is punitive; their choice of procedures is punitive under *Jones* and *Bell* in violation of Hoisington's clearly established right to be free of punitive conditions.

[5] *See Sharp*, 233 F.3d at 1169.

C. Defendants Have Failed to Exercise Appropriate Professional Judgment in Violation of Hoisington's Clearly Established Right to Receive More Considerate Treatment and Conditions of Confinement than Criminals.

Defendants' blanket policy, identical to that used for all Washington State prisoners, violated Hoisington's rights as a civil detainee to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982). Although *Youngberg* established that decisions by professionals, when balancing the relevant state interests against the liberty interests of the involuntarily committed, are presumptively valid, liability may be imposed "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not actually base the decision on such judgment." *Id.* at 323.

Defendants, though, have presented no evidence that they have considered the negative effect that strip and visual body cavity searches have on the SCC's treatment environment and on its residents and balanced that against SCC's security and contraband concerns in light of the known, readily available alternatives. This failure of Defendants to consider the effect of strip searches on SCC's treatment environment highlights that Defendants are not entitled to deference under the *Youngberg* professional judgment standard.

Hoisington presented uncontroverted evidence that strip searches are destructive of SCC's treatment environment. ER 54. In previous litigation involving conditions of confinement at the SCC, its former clinical director Dr. Smith referred to strip searches as an abomination. *Id*. (discussing 1998 *Turay* injunction which forbade routine strip searching of SCC residents following contact visits). Judge Dwyer in *Turay* found that "[t]he professional opinion is unanimous that . . . [routine strip searches of residents following every visit] are not just degrading but profoundly inimical to successful treatment." Rep.Op.Br. Addendum Vol. 1 at 43.

Hoisington also presented evidence that strip searches following visits are inconsistent with existing professional standards for treatment of civilly committed sex offenders. ER 57. A report submitted by Dr. Fred Berlin in an Illinois case involving searches of civil detainees stated: "In my professional opinion, these types of routine strip searches, which at best are based upon both an uncertain and an unconvincing rational [sic], depart substantially from accepted practice, judgment, and/or standards, within the field of inpatient mental health treatment." ER 92-93.[6]

[6] Defendants attempt to undercut report's validity by misstating the holding in the case in which the report was presented. Defendants incorrectly state that the "judge found that the strip searches . . . complained of by the residents of the Illinois SVP

Instead of rebutting Hoisington's arguments, Defendants misstate a key fact when they argue that the Inspection of Care Committee (IOCC), an independent outside monitoring body for the SCC, supports their professional judgment to strip search residents. Rep.Ans.Br. at 28-29. Defendants incorrectly attribute SCC official Cathi Harris's opinion to the IOCC. *Compare* SER 26 (Harris declaration) *with* SER 72-78 (IOCC report) *and* SER 84 (Defendants correctly attribute statement to Harris in their summary judgment motion).

Instead of addressing Hoisington's arguments, Defendants relate sensational tragic events involving escaped prisoners or treatment appropriate for prisoners. Rep.Ans.Br. at 23-24; 19-20.[7] Defendants' attention to prisoners and prisons indicates that prisons and prisoners form an important basis for their judgment in assessing the SCC's actual security needs and what treatment is appropriate for

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program 'are not [a] substantial departure[ ] from accepted professional judgment and standards, and therefore are constitutionally permissible.'"). ER 45 (*quoting Hargett v. Adams*, No. 02 C 1456, 2005 WL 399300 at *12 (N.D. Ill. Jan. 14, 2005); *but see Davis v. Peters*, 566 F. Supp. 2d 790, 816 (N.D. Ill. 2008) (citing *Hargett*, 2005 WL 399300, at *15) (constitutionality of strip search in *Hargett* not reached because plaintiffs' claims mooted after defendants substituted less intrusive search procedures). FRAP 32.1 prohibits citation to pre-2007 unpublished opinions. Our citations are to Defendants' pleadings and a published case that cite *Hargett*.

[7] Defendants contend that Hoisington poses a safety risk despite full restraints by referencing incidents where officials were killed by restrained inmates. Rep.Ans.Br. at 23-24. However, those incidents involved criminal detainees, with no leg restraints and less restrictive handcuffs. *United States v. Sanders*, 994 F.2d 200, 210 n.60 (5th Cir. 1993).

non-criminal civil detainees.[8]

The failure of the court below to consider Hoisington's Fourteenth Amendment claim constitutes reversible error. The Court should reverse the District Court's order granting summary judgment for Defendants and remand for further proceedings under the appropriate legal standard.

II. Defendants' Search Policies Violate Hoisington's Clearly Established Fourth Amendment Rights.

Hoisington was subjected to repeated, humiliating, and invasive strip searches that violated his clearly established Fourth Amendment right to be free of unreasonable searches and seizures. *See Hydrick v. Hunter*, 500 F.3d 978, 992-93 (9th Cir. 2007), *rev'd on other grounds*, *Hunter v. Hydrick*, 129 S.Ct. 2431 (2009), *on remand*, *Hydrick v. Hunter*, 669 F.3d 937 (9th Cir. 2012).[9]

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[8] Further evidence that Defendants did not appropriately exercise required professional judgment comes from violation of their own procedures. WAC 388-880-110(2) (SCC superintendent or designee "*shall* determine the use and type of restraints necessary for each escorted leave on an *individual* basis") (emphasis added). This statute creates a protected liberty interest protected under Fourteenth Amendment procedural due process clause. *See Carlo v. City of Chino*, 105 F.3d 493, 495-97 (1997) (9th Cir. 1997). Defendants' failure to make individualized determination with regard to restraints reflects both a failure to exercise required professional judgment and a procedural due process violation.

[9] Defendants misrepresent *Bell*, *Turner*, and *Hydrick* as holding that thorough searches of SVPs were constitutional. Rep.Ans.Br. at 15. In fact, *Bell* involved pretrial detainees, 441 U.S. at 523, and *Turner* involved prison inmates, *Turner v. Safley*, 482 U.S. 78, 81 (1987). Further, this Court in *Hydrick* recognized that

Because civilly committed individuals are in a wholly different environment than individuals being processed into the criminal justice system, this Court should apply a different standard to justify strip searches for civil detainees, allowing strip searches only on reasonable suspicion. In the alternative, even if the Court were to apply the standards applicable to criminal detainees in *Bell*, 441 U.S. at 523, Defendants' strip search policies are unreasonable intrusions.

A. Residents Held In Civil Custody Should Not Be Strip Searched Absent Individualized Suspicion, and the State Did Not Have Any Reasonable Suspicion that Hoisington Possessed Contraband.

While past courts analyzing the Fourth Amendment rights of civil detainees have looked to case law regarding the rights of pretrial detainees, *see, e.g.*, *Serna v. Goodno*, 567 F.3d 944, 952-55 (8th Cir. 2009), the circumstances justifying searches in those two contexts are materially different and, thus, the Fourth Amendment standards should be different. Indeed, this Court has recognized that certain civil detainees should not be subject to strip searches absent reasonable suspicion.[10]

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civilly committed sex offenders had a clearly established right to be free from unreasonable searches and seizures. 500 F.3d at 992-93.

[10] *See, e.g., United States v. Handy*, 788 F.2d 1419, 1420 (9th Cir. 1986) (reasonable suspicion required for customs officials for border checkpoint strip search); *United States v. Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970) (same). *See also Chehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1112 (D. Nev.

Courts have repeatedly held that civilly detained individuals are entitled to protection "at least as great as" the protection granted individuals in the criminal justice system. Contrary to Defendants' assertion that Hoisington's privacy interests are "considerably more limited" than a pretrial detainee, Rep.Ans.Br. at 16, civil detainees are, in fact, afforded greater protection than detainees in the criminal justice system. *See, e.g., Jones*, 393 F.3d at 932 (civil detainees retain "greater liberty protection than individuals detained under criminal process"). None of these courts have held that protections afforded civil detainees must be the same as those afforded individuals detained under criminal process, so the Court is not be bound to apply Fourth Amendment standards applicable to pretrial detainees.

2009) (non-admitted aliens); *Tungwarara v. United States*, 400 F. Supp. 2d 1213 (N.D. Cal. 2005) (same); *Aiken v. Nixon*, 236 F. Supp. 2d 211, 234-35 (N.D. N.Y. 2002) (psychiatric facilities).

Further, Defendants' reliance on *Earls*, *Block*, and *Hudson* to argue that searches may be conducted absent reasonable suspicion in other contexts, Rep.Ans.Br. at 17, is misplaced as those cases did not involve strip searches of civil detainees. *See Block v. Rutherford*, 468 U.S. 576 (1984) (prohibition on pretrial detainees' contact visits); *Hudson v. Palmer*, 468 U.S. 517 (1984) (prisoners). Contrary to Defendants' assertion, the Supreme Court has held that school officials must have reasonable suspicion before conducting strip searches of students. *Compare Bd. of Educ. of Indep. Sch. Dist. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831-32 (2002) (upholding random urine tests of students engaged in extracurricular activities) (Rep.Ans.Br. at 17) *with Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364 (2009) (reasonable suspicion required for strip searching students).

While *Florence* held that pretrial detainees may be strip searched without reasonable suspicion, *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S.Ct. 1510, 1519 (2012), the reasons supporting blanket strip searches in that case are absent in the context of civil commitment. In *Florence*, the analysis focused on the dangers associated with admitting new detainees into jails. *Id.* at 1518-19 (explaining how the "admission of inmates" creates numerous risks for facility staff and the jail population). Due to these concerns, the Court upheld strip searches without individualized suspicion. *Id.* at 1520.

While the concerns articulated in *Florence* may justify blanket strip searches upon admission to jail, no similar concerns justify strip searches of individuals already confined in a secure facility. *See N.G. v. Connecticut*, 382 F.3d 225, 234 (2d Cir. 2004) (strip searching juveniles transferred between secure facilities to another absent reasonable suspicion violated juveniles' Fourth Amendment rights). In the present case, residents, like Hoisington, are in a secure environment at all times. When Hoisington leaves SCC, two armed guards remain with him at all times, even during medical procedures. ER 8. He is in full restraints during transportation and held in a separate compartment on the ferry. *Id.* While *Florence* recounted numerous instances in which pretrial detainees smuggled contraband into jails through oral cavities, 132 S.Ct. at 1521, Defendants offer no evidence

that contraband has been discovered during off-island transports. ER 12.

Further, in *Florence*, the Court noted it was reasonable to suspect smuggling by pretrial detainees "because officials there know so little about the people they admit at the outset." *Id*. at 1521. In contrast, SCC staff know their residents. Hoisington has lived at the SCC for more than ten years, and SCC staff know he has never assaulted staff, possessed contraband, or tried to escape. ER 9.

Given the diminished need to search in the controlled environment of the SCC, as weighed against the extraordinary intrusiveness of a strip search, strip searches should only be conducted on a showing of reasonable suspicion. *See supra* n.8 (listing cases requiring reasonable suspicion prior to strip searches of civil detainees).[11]

Defendants had no reasonable suspicion prior to strip searching Hoisington. Reasonable suspicion supports a search only where there exists "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (internal citations omitted). Again, Hoisington has never possessed contraband, assaulted staff members, or tried to escape, and he is controlled by two guards and shackled

[11] Even *Bell* has been recognized to require "some unarticulated level of individualized suspicion." *Serna*, 567 F.3d at 951 (citing *Bell*, 441 U.S. at 559) (fact that defendants' justifications were "general in nature, not specific to [plaintiff]" weighed against finding search reasonable).

during every moment off-island. ER 8-9. There was no reason to believe he possessed or acquired contraband prior to any of the strip searches. Therefore, the strip searches violated his Fourth Amendment rights.

B. Even if Individualized Suspicion Is Not Required to Justify a Visual Body Cavity Search and the Court applies the *Bell* and *Turner* Factors, There Are Genuine Issues of Material Fact as to Whether Search Was Unreasonable.

Subjecting Hoisington to strip searches violates his Fourth Amendment rights even under the factors laid out in *Bell*, and *Turner v. Safley*, 482 U.S. 78 (1987), or, at the very least, material issues of fact exist as to whether the searches were unconstitutional under those factors, making summary judgment inappropriate. Even without requiring individualized suspicion, this Court has held that summary dismissal is inappropriate in almost every case in which civilly detained sex offenders have challenged the constitutionality of strip searches. *See, e.g., Hydrick*, 500 F.3d at 992-93 (affirming denial of defendants' motion to dismiss because material issue of fact existed regarding whether strip searches violated civilly detained sex offender's Fourth Amendment rights); *Jones*, 393 F.3d at 934 (reversing summary judgment for defendants because material issues of fact existed regarding whether strip searches constituted punitive conditions of confinement violating civilly committed sex offender's Fourteenth Amendment rights); *Bacon v. Kolender*, Civ.No. 05-0310 , 2007 WL 2669541, at *8 (S.D. Cal.

2007); *Meyers v. Pope*, 303 Fed. Appx. 513, 516 (9th Cir. 2008) (unpublished). The District Court erred in entering summary judgment for Defendants under *Bell* and *Turner*.

1. Even if *Bell* applies, the Policies Mandating Strip Searches Violated Hoisington's Fourth Amendment Rights Because They are not Reasonably Related to Legitimate Civil Commitment Objectives in Light of Readily Available Alternatives.

Contrary to Defendants' argument, where civilly committed sex offenders and pre-trial detainees have challenged invasive strip searches, courts have applied the factors laid out in *Bell*, not those enumerated in *Turner*. *See, e.g.*, *Demery v. Arpaio*, 378 F.3d 1020, 1028-29 (9th Cir. 2004) (holding that *Turner* does not apply to pretrial detainees because "*Turner* dealt with convicted prisoners, not pretrial detainees… [and] involved an Eighth Amendment cruel and unusual punishment claim."); *Bacon*, 2007 WL 2669541, at *6-8; *Serna*, 567 F.3d at 949.

When examining the reasonableness of a search under *Bell*, a court must consider "(1) the scope of the particular intrusion; (2) the manner in which the search is conducted; (3) the justification for initiating the search; and (4) the place where the search is conducted." 441 U.S. at 559.

As to the first factor, the scope of the particular intrusion is uncontrovertibly

invasive.[12] Whenever Hoisington leaves for and returns from an off-island medical appointment, he is "instructed to remove all of his clothing lift his genitals and then bend over and spread his buttocks apart." ER 252. These types of full strip searches are, as Hoisington contends, intrusive, frightening, humiliating, and degrading. *See, e.g., Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("strip search is indisputably a 'frightening and humiliating' invasion, even when conducted 'with all due courtesy.' Its intrusiveness 'cannot be overstated.'") (internal citations omitted). The scope of the search weighs in favor of a determination of unreasonableness.

As to the second factor, Hoisington has raised a genuine issue of material fact with regard to the manner in which the invasive visual body cavity searches are conducted. Specifically, Hoisington has alleged that, while these searches are conducted in a separate room, "the door to that room is always open and there has been up to six staff there." ER 110. Defendants have not explained why the room remained open during the search nor why six staff members were present during the searches. *See Way*, 445 F.3d at 1160-61 (while ultimately upholding strip searches of pretrial detainees, noting that the searches took place in a private room, behind closed doors, with no one present but the officers conducting the search);

[12] Neither the Magistrate, nor the District Court, addressed the intrusiveness of the strip searches. ER 1-2,11.

Serna, 567 F.3d at 954 (upholding strip search of civilly committed sex offenders where searches were conducted in private bathrooms, not in public or semi-public areas, with no extraneous personnel present); *Byrd*, 629 F.3d at 1143-45 (finding search of pretrial detainee unreasonable, in part because "ten to fifteen non-participating officers" were present). Instead of addressing the absence of privacy during these searches, the State simply asserts that "the searches are conducted in a manner so as to provide the resident with as much privacy as possible." Rep.Ans.Br., at 26. No explanation is given as to why more privacy is not possible. Accordingly, the district court erred when it found that there were "insufficient to support a claim that the manner and scope of the searches [were] unconstitutional." ER 11.

As to the third *Bell* factor, Hoisington has raised genuine issues of material fact as to whether either of the two visual body cavity searches—prior to his departure and upon his return— is justified, given the other security procedures taken by the SCC and the availability of other, less intrusive alternatives. Prior to transport off-island, Hoisington resides in a secure facility, and residents do not "try to take any kind of contraband on an off island medical trip." ER 56. Defendants fail to indicate what types of contraband Hoisington could possess that would warrant a strip search prior to off-island trips, and cite *no* reports of

residents possessing harmful contraband.

Hoisington has also challenged the need for visual body cavity searches after he returns to the SCC after medical visits. Specifically, he has asserted that residents have no way of obtaining contraband during any off-island trips. During each trip, Hoisington "has two [armed] guards next to him at all times… never leaves the eyesight of the guards."[13] ER 56. The guards remain with him even during his medical procedures. ER 8. Furthermore, he "is in belly restraints, and can only move his hand three inches or less." ER 56. Given these limitations, Hoisington questions whether "a nurse or doctor could or would hand a resident drugs or a weapon." *Id.* Hoisington has never tried to escape,[14] he has no record of drugs or contraband while at SCC, and there is no evidence that contraband has been found on any SCC residents following strip searches. ER 12, 56. Defendants provide no explanation for why it is necessary to strip search Hoisington when he has no means or opportunity to obtain contraband during off-island transport.

Instead, the State has offered only generalized security and safety

[13] Hoisington is held in separate compartment during ferry rides. ER 8.
[14] Defendants' only example of an attempted "escape" twenty-one years ago, Rep.Ans.Brief, 24, involved an individual who was neither handcuffed, shackled nor in SCC custody. *Turay v. Cunningham*, Civ.No. 10–5493m 2011 WL 1085897, *6 (describing incident where resident shackled and cuffed after attempted escape).

justifications for the strip searches.[15] However, a general invocation of security concerns cannot satisfy *Bell*. *Bacon*, 2007 WL 2669541 at *7. When defendants in *Bacon* asserted that similar searches "were in furtherance of the jail administration's legitimate goal of jail security," the court found that it did not have the "facts to determine whether Defendants' policies were 'reasonably related' to maintaining jail security." *Id*. Without a "showing of whether these [SVPs] have access to contraband" the factual record was deemed insufficient and summary judgment in favor of the defendants improper. *Id*. *Compare Florence*, 132 S.Ct. at 1521 (upholding strip searches of pretrial detainees in light of concrete evidence that contraband had been found during strip searches of such detainees).

Defendants failed to produce any evidence "that any resident has tried to smuggle any type of illegal contraband in or out of the institution." *Id*. at 53. Instead, to support its assertions about contraband and justify strip searches, Defendants points to several news articles addressing contraband at SCC. ER 190 n.3. However, these articles suggest that staff members were responsible for

[15] Defendants argue generally that strip searches are necessary to protect state employees, the safety needs of the community through which he is transported, and others because "contraband is an identified problem at the SCC" and criminal history of SCC residents. Rep.Ans.Br. 16,20,27. While these justifications might be sufficient to warrant *some* safety procedures, they offer little support for routine strip searches, especially given the restraints and circumstances of off-island transport that limit detainees' access to contraband.

bringing forbidden items to residents.[16] Accordingly, even if contraband is a serious concern, further factual inquiry is necessary to determine whether the strip search policy actually addresses the problem.

While Defendants argue that facilities in Iowa, Illinois, and Florida conduct strip searches, Rep.Ans.Br. at 8, they fail to show whether the programs, facilities, and policies in those facilities are adequately analogous to those at the SCC, i.e., whether strip searches are conducted in conjunction with the use of armed guards and restraints and both prior to and after all trips outside the facility; and whether concrete evidence of smuggling existed to justify the searches.

Finally, in assessing the reasonableness of the Defendant's strip search policy under *Bell*, the Court must consider the availability of less invasive alternatives that could have adequately met the safety and security objectives cited by Defendants. *See, e.g., Serna*, 567 F.3d at 955 ("[I]t is proper for courts to consider the availability of simple, safe, and less invasive techniques that officers elected not to pursue when assessing the reasonableness of performing body cavity searches en mass on a treatment center population"). As described *supra*, there are

[16] *See* Levi Pulkkinen, "Sex predator sentenced for smuggling crack into Commitment Center," SEATTLE PI, March 25, 2010, http://www.seattlepi.com/local/article/Sex-predator-convicted-of-smuggling-crack-into-892950.php (reporting on SCC staff member who smuggled cocaine into facility for detained sex offender).

a number of alternatives available at SCC: first, the existing DOC policy used by SCC requires officials to conduct two thorough pat searches in lieu of a strip search in "areas without a secured area for a strip search." ER 133.The express inclusion of this alternative makes clear that it satisfies Defendants' security concerns.[17] Second, SCC already has and uses a full body x-ray scanner and a metal detector, canine searches, pat/frisk searches, and hands-on inspection procedures.[18] The district court erred by failing to consider any of these alternatives in determining the reasonableness of the strip searches. Because Defendants failed to meet their burden by showing that less invasive search methods are not available or otherwise deficient, summary judgment was inappropriate.

The fourth *Bell* factor, which considers the place where the search is conducted, was addressed above, in the discussion of the second factor, the manner in which the search is conducted. *See Bacon*, 2007 WL 2669541, at *6.

2. The District Court Erred in Finding that the SCC Policy Was Valid Under *Turner*.

As discussed *supra*, the *Turner* test should not be applied in the civil commitment context. However, even if this court finds it necessary to run the four-

[17] In fact, Defendants cited with approval the use of "thorough pat down searches" in an Arizona facility for detained sex offenders. Rep.Ans.Br. at 8; ER 7.
[18] ER 33, 58; *see SCC Personal Visiting Policy 220*, at 7.

step *Turner* test, the outcome should mirror that under the *Bell* test. *See* Rep.Op.Br. at 24-27, 51-54.

III. The Defendants Are Not Shielded by Qualified Immunity on Hoisington's Claims for Declaratory and Injunctive Relief, and Material Issues of Fact Exist with Regard to Whether Defendants Violated His Clearly Established Rights under the Fourth and Fourteenth Amendments.

Hoisington seeks declaratory and injunctive relief, as well as monetary damages, ER 11-12, and Defendants cannot claim qualified immunity as to his claims for equitable relief. *See Hydrick*, 669 F.3d at 939-40. The defense of qualified immunity would apply, if at all, only with regard to Hoisington's claims for monetary damages, *id.*, and material issues of fact exist with regard to whether such immunity applies to Hoisington's money damages claims.

Qualified immunity does not shield government officials if the plaintiff shows (1) that the official violated a statutory or constitutional right and (2) that the right was "clearly established" at the time of the challenged conduct. *See Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011).

First, as described *supra* Parts II and III, Hoisington has sufficiently argued that Defendants violated his constitutional rights by imposing conditions of his confinement and strip searches that violate his Fourteenth and Fourth Amendment rights. *See* ER 254-55. This Court in *Hydrick* and *Jones* held that civilly detained

sex offenders possess clearly established rights under the Fourth and Fourteenth Amendments. *Hydrick*, 500 F.3d at 988-1000; *Jones*, 393 F.3d at 932. Because material issues of fact exist as to whether the Defendants' policies violated those rights, Defendants are not entitled to summary judgment.

Second, Hoisington's Fourth Amendment right to be free of unreasonable searches and seizures and his Fourteenth Amendment rights to non-punitive conditions of confinement have been clearly established. *See Jones*, 393 F.2d at 932; *see also Hydrick*, 500 F.3d at 932 (reversing entry of summary judgment for defendants on ground that material issues of fact existed with regard to whether strip searches and shackling constituted punitive conditions of confinement);[19] *Meyers*, 303 Fed. Appx. at 516 (vacating summary judgment for defendants on civilly detained SVP's Fourteenth Amendment claims on ground that his substantive due process rights were "clearly established" when he was detained and strip searched in county jail in 2002). Further, in *Hydrick*, this Court refused to dismiss an action brought by civilly committed sex offenders, reasoning that

[19] This Court in *Hydrick* later dismissed plaintiffs' damages claims on qualified immunity grounds because the complaint failed to allege any "*specific* policy implemented by the Defendants or a *specific* event or events instigated by the [supervisory] Defendants." 669 F.3d at 939 (emphasis in original). Here, Hoisington has sufficiently alleged a *specific* policy that Defendants implemented or maintained. *See* ER 247-49. We note that this Court in *Hydrick* upheld plaintiffs' claims for equitable relief. *Id*. at 941.

subjecting them to unreasonable strip searches would violate their clearly established Fourth Amendment. 500 F.3d at 992-93.

Defendants, charged with the custody of civilly committed sex offenders, should have been well aware of this Court's unequivocal rulings in *Hydrick* and *Jones* that individuals civilly detained as sexually violent predators possess clearly established rights against unreasonable, punitive, and excessive strip searches and other conditions of confinement. *Hydrick*, 500 F.3d at 988-1000; *Jones*, 393 F.3d at 932. While Defendants appear to argue that they could have reasonably believed their strip searches were lawful under *Michenfelder*, *Bell*, and *Richmond*, Rep.Ans.Br., at 41-42, those cases upheld strip searches of individuals in the criminal justice system, not individuals in civil detention. *See Michenfelder*, 860 F.2d 328, 331 (9th Cir. 1988) (prisoner in maximum security facility); *Bell*, 441 U.S. at 558 (pretrial detainees); *Richmond v. City of Brooklyn Ctr.*, 490 F.3d 1002, 1006-07 (8th Cir. 2007) (same). Defendants could not have reasonably relied on case law applicable to individuals in the criminal context when this Court has made clear that civilly detained SVP's cannot be "confined in conditions identical to [or] similar to" detainees in the criminal context and that strip searches must be reasonable. *Jones*, 393 F.3d at 932.

Further, Defendants appear to argue that they could have reasonably

believed that their shackling and strip searches of Hoisington were valid under the Seventh Circuit's decision in *Thielman v. Leean*, 282 F.3d 478 (7th Cir. 2002). Rep.Ans.Br. at 42. However, not only is *Thielman* not the law of this Circuit, but Thielman did not challenge the range or severity of deprivations alleged by Hoisington, e.g, strip searches and handcuffs with full restraints, and the Court accordingly dismissed his claims as "the stuff of nickels and dimes." *Id.* at 484. The humiliating and degrading conditions that Hoisington was subject to, unlike those in *Thielman*, is hardly "the stuff of nickels and dimes." *Id*.

IV. Hoisington's Claims for Prospective Relief Are Not Barred by the Eleventh Amendment.

While a damages suit against defendants in their official capacities is barred by the Eleventh Amendment, state officials may be sued in their official capacities under the Eleventh Amendment when seeking a prospective injunctive remedy for a continuing violation of federal law. *Ex Parte Young*, 209 U.S. 123, 159-160 (1908). Hoisington has made clear that he is suing the defendants (1) in their official capacities for prospective injunctive and declaratory relief and (2) in their individual capacities for damages. ER 39, 67, 247-250. Because Hoisington's official capacity claim for prospective relief to remedy an ongoing violation of federal law, it is not barred by the Eleventh Amendment, as the court implicitly found below. ER 20.

Defendants incorrectly assert that the court dismissed all claims against them in their official capacities, Rep.Ans.Br. at 43; it would have been error for the court to dismiss Hoisington's claims against the defendants in their official capacities under the Eleventh Amendment. *Hydrick*, 500 F.3d at 984 (plaintiffs could challenge constitutionality of conditions of civil confinement and seek injunctive and declaratory relief under §1983); *Sharp*, 233 F.3d at 1171-73 (upholding injunction to remedy ongoing constitutional violations by SCC).

Further, Defendants claim they "have supplemented the record to clarify that currently, the SCC – rather than DOC – is supervising the searches and off-island transportation of residents at the SCC." Rep.Ans.Br. at 6 n.4. This is incorrect. The court below, on June 7, 2012, denied Defendants' motion to supplement the record. Dist.Ct.Docket #48. While this fact might be considered for judicial notice, it is not properly before this Court and defendants have not made a sufficient factual that DOC will not in the future be involved in transporting SCC residents.

CONCLUSION

Plaintiff respectfully requests this Court to overturn the lower court's grant of summary judgment to Defendants. In doing so the Court should rule that, as a non-criminal detainee, Hoisington has a clearly established right to be free from strip and visual body cavity searches that are not based on individualized suspicion

and that the adoption of punitive DOC policies violates Hoisington's clearly established right to a constitutionally adequate treatment environment. Finally, because of the complexity and weightiness of his claims, Hoisington asks the Court to order that counsel be appointed upon remand. Appointment of counsel below will permit full consideration of the important constitutional issues raised by Hoisington. *Cf. Jones*, 393 F.3d at 937 (counsel appointed on remand for civil detainee challenging conditions of confinement following successful appeal after pro bono counsel appointed for appeal); *Meyers*, 303 Fed.Appx. at 513 (same).

RESPECTFULLY SUBMITTED this 18th day of June, 2012.

RONALD PETERSON LAW CLINIC

By: s/Anjana Malhotra
Anjana Malhotra
malhotra@seattleu.edu
Robert S. Chang
changro@seattleu.edu
Lorraine K. Bannai
bannail@seattleu.edu
William Witherspoon
withersp@seattleu.edu
Yurij Rudensky
rudensky@u.washington.edu

Attorneys for Plaintiff-Appellant
MONTE HOISINGTON

CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(A)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 10-35917

I certify that: (check appropriate option(s))

☒ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached ***Plaintiff-Appellant's Replacement Reply Brief*** is

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DATED: June 18, 2012

RONALD PETERSON LAW CLINIC

By: s/Anjana Malhotra

Anjana Malhotra
malhotra@seattleu.edu
Robert S. Chang
changro@seattleu.edu
Lorraine K. Bannai
bannail@seattleu.edu
William Witherspoon
withersp@seattleu.edu
Yurij Rudensky
rudensky@u.washington.edu

Attorneys for Plaintiff-Appellant
MONTE HOISINGTON

CERTIFICATE OF SERVICE

I hereby certify under the penalty of perjury under the laws of the State of Washington that I electronically filed the foregoing Plaintiff-Appellant Replacement Reply Brief pursuant to FRAP 32.1(b) with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 18, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system to the following CM/EF participants.

William M. Van Hook
Office of the Washington Attorney General (Olympia)
Social & Health Services
7141 Cleanwater Dr., SW
Olympia, WA 98504-0124

s/ Anjana Malhotra
Anjana Malhotra, Esq.
Seattle University School of Law