5-4-2012

Plaintiff-Appellant's Opening Replacement Brief

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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 OPENING REPLACEMENT BRIEF

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STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit has jurisdiction to review the decision below pursuant to 28 U.S.C. § 1291. The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The district court granted summary judgment in favor of defendants on September 23, 2010. Excerpt of Record ("ER") 2. Appellant timely filed his Notice of Appeal pursuant to Fed. R. App. P. 4(a)(1)(A) on October 7, 2010. ER 23–27.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Defendants were entitled to summary judgment on Plaintiff's section 1983 claim challenging Defendants' blanket policy mandating strip searches, visual body cavity searches, and heavy restraints before and during transportation off-island, where such treatment violates Plaintiff's due process rights under the Fourteenth Amendment.

2. Whether Defendants were entitled to summary judgment on Plaintiff's section 1983 claim for Defendants' blanket policy mandating strip searches and visual body cavity searches before and after off-island transportation where such treatment violates Plaintiff's Fourth Amendment rights.

STATEMENT OF THE CASE

On October 26, 2009, the Plaintiff Monte Hoisington ("Hoisington") filed a *pro se* civil rights complaint pursuant to 42 U.S.C § 1983 and 42 U.S.C § 1997 *et seq.*, stating that Defendants' ongoing blanket policy mandating strip searches, visual body cavity searches, heavy restraints, and other harsh treatment incident to transportation off-island for medical treatment violates his constitutional rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. Hoisington sought declaratory and injunctive relief, monetary damages, and reasonable attorney's fees. He also demanded a jury trial.

On April 27, 2010, Defendants filed a motion for summary judgment. ER 185. Magistrate Karen Strombom recommended that summary judgment be granted. ER 3. Hoisington filed objections to the Magistrate's Report and Recommendation. ER 31. On Sept. 23, 2010, the district court adopted the Magistrate's Report and Recommendation, granted summary judgment for defendants, and dismissed the case. ER 2.

Hoisington timely filed a Notice of Appeal. ER 23. Appearing pro se, he filed Appellant's Informal Opening Brief on January 5, 2011. The defendants filed their Answering Brief on February 28, 2011. Upon review of the record, the Ninth Circuit Court of Appeals determined that appointment of pro bono counsel in this

appeal would benefit this Court's review. Accordingly, this Court appointed pro bono counsel on February 15, 2012, set the briefing schedule, and noted that oral argument would be scheduled during the month of October 2012.

STATEMENT OF FACTS

Washington state's Special Commitment Center ("SCC") is located on McNeil Island and is operated by the state's Department of Social and Health Services ("DSHS"). The SCC is designed to provide indeterminate confinement and care for certain individuals who have completed their incarceration sentences. ER 3. After completing a ten-year prison sentence, Hoisington was civilly committed on July 25, 2001, to the SCC under Washington's sexually violent predator statute, RCW 71.09. *State v. Hoisington*, 123 Wash. App. 138, 141, 144, (Wash. Ct. App. Div. 3); ER 136. The SCC has held Hoisington in civil custody for approximately eleven years. ER 136.

Those committed to the SCC are labeled "residents," and their commitment is civil in nature. *See* RCW 71.09.200; RCW 71.09.060. Though confined, residents are not prisoners and confinement is not intended to punish or create a punitive environment.[1] Additionally, residents have a statutory "right to adequate care and individualized treatment." RCW 71.09.080(3).

[1] See *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000).

A. Previous SCC Constitutional Violations to Provide Adequate Care and Non-punitive Confinement Conditions

Despite the requirements that care must be adequate and conditions of confinement must be non-punitive, the SCC's treatment of its residents has been the subject of many years of contentious litigation. *See Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132, at *1 (W.D. Wash. Mar. 23, 2007). Following a trial in 1994, the jury found that the SCC was not providing to its residents constitutionally adequate mental health treatment. *Id.* Later that year, the district court ordered "the SCC to bring the treatment program into compliance with constitutional requirements." *Id.* Subsequently, another group of SCC residents sued the SCC over the conditions of confinement. *Id.* This action was combined with the *Turay* case. *Id.*

In October 1998, an evidentiary hearing was conducted. In November 1998, the district court found that the SCC had failed to meet its constitutional requirements and issued an order that included the elimination of routine strip searches of SCC residents following every contact visit. *Id.*[2] At this hearing, "[t]he

[2] The 1998 order required the following:

> additional staff training at the SCC; provision of a coherent and individualized treatment program for each resident; adequate provision for participation by the residents' families in rehabilitation efforts; construction of a separate treatment-oriented facility; elimination of the routine strip

SCC director testified that he found the routine strip searching to be an 'abomination.'" *Sharp v. Weston*, 233 F.3d 1166, 1170-71 (9th Cir. 2000).

In November 1999, the district court found the SCC to be in contempt. *Id*. at *2. This Court upheld the 1998 remedial order. *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000). Instead of making treatment-directed decisions made by the professional directors of the SCC, Washington state Department of Corrections ("DOC") policies were adopted, often without requesting different treatment of SCC residents. *Id*. at 1172 n.3.

The sanctions remained in force until the contempt order was purged in June 2004 following SCC efforts to come into compliance. *Turay*, 2007 WL 983132, at *2. In 2007, the district court dissolved the injunction. *Id*. at *5. In doing so, the court noted: "This case has been troublesome to the Court in that there seems to be no right answer, and no good fix for the situation these plaintiffs face at the SCC." *Id*.

B. Defendants Subject SCC Residents to the Same Strip Search and

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> searches of SCC residents following every visit; elimination of the monitoring of residents' telephone calls and the bar on outgoing calls; negotiation with McNeil Island Correction Center ("MICC") management to obtain better meal and activity schedules; improvement to the treatment environment; and the initiation and implementation of program oversight both by an internal review process and by an external body.

Turay, 2007 WL 983132, at *1.

Restraint Techniques Prescribed for Convicted Prisoners on SCC Residents When They Are Escorted Off-Island.

Defendant Robin Williams is the former Secretary of DSHS; defendant Susan N. Dreyfus is the current Secretary of DSHS; defendant Kelly Cunningham is the current Superintendent of SCC;[3] defendant Ronald Van Boening was the superintendent of the McNeil Island Correctional Center when the complaint was filed. ER 247-250. Defendants were or are responsible for developing and implementing the policies mandating strip and visual body cavity searches, full restraints, as well as other policies setting forth conditions incident to off-island transport. *Id*. The SCC and DOC are not restricted by a Washington state statute which forbids strip and cavity searches of pretrial detainees booked into holding, detention, or local correctional facilities absent a warrant or reasonable suspicion. *See* RCW 10.79.060 et seq.

In April 1998, the SCC moved from Monroe, Washington, onto McNeil Island, within the McNeil Island Correctional Center ("MICC") complex. ER 136. At this time, the SCC formulated an agreement with the DOC, whereby DOC would transport SCC residents off-island. *Id*. Under certain circumstances, residents are allowed supervised off-island visits. RCW 71.09.210 (permitting supervised off-island trips for funeral or bedside visit of immediate family-member

[3] Service was not perfected on Henry Richards, the former Superintendent of SCC.

who is seriously ill, or for necessary medical or dental care).

Pursuant to its agreement with SCC officials, the DOC uses the same invasive strip search procedures and harsh restraint techniques prescribed for convicted prisoners on SCC residents. ER 104 ¶ 6. The DOC Policy used for transporting SCC residents is classified as applicable to "Prisons." ER 128. The policy statement says that it provides guidance for transporting "*offenders.*" ER 129. In fact, the term *offender*[4] or variations thereof are used sixty times in the short seven page document. ER 128-34.

The DOC has no distinct policy for transporting individuals who are civilly committed. ER 124–25 ¶ 2-3. Neither DSHS nor DOC have modified the strip search or restraint policies to tailor them to civilly committed residents or to

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[4] The Revised Code of Washington provides the following definition:

> (34) "Offender" means a person who has committed a felony established by state law and is eighteen years of age or older or is less than eighteen years of age but whose case is under superior court jurisdiction under RCW 13.04.030 or has been transferred by the appropriate juvenile court to a criminal court pursuant to RCW 13.40.110. In addition, for the purpose of community custody requirements under this chapter, "offender" also means a misdemeanant or gross misdemeanant probationer ordered by a superior court to probation pursuant to RCW 9.92.060, 9.95.204, or 9.95.210 and supervised by the department pursuant to RCW 9.94A.501 and 9.94A.5011. Throughout this chapter, the terms "offender" and "defendant" are used interchangeably.

RCW 9.94A.030.

determine security needs on an individualized basis. *Id*; ER 104. DOC correctional officers assigned to strip searching, restraining, and supervising SCC residents for transport receive no special instruction or training to handle SCC residents. ER 104 ¶ 4. Instead, DOC staff need only be qualified and trained to transport *criminally convicted* offenders under DOC supervision. ER 125 ¶ 3.

As described by Mr. Hoisington and other SCC residents, the practices of the DOC transportation officers are painful and degrading. Handcuffs are sometimes applied so tightly that they cause loss of feeling in the hands. ER 110 ¶ 18. The officers chain residents to hospital beds and put leg irons on someone who must walk on crutches. ER 121 ¶ 6. Escorting officers insist on standing guard inside the operating room during surgery on the basis of DOC "policy," rather than observing the doctor's wishes and waiting outside. ER 121 ¶ 5. Officers have undermined physical therapy after major surgery by insisting on leg irons. ER 121 ¶ 7. Rather than take notice and temper these punitive conditions, the SCC defendants permit the DOC to use their standard policies that are designed for punishing criminals. ER 251 ¶ 5.3. Defendants have made no effort to mitigate the harsh effects of the DOC policy by seeking or providing different treatment for SCC residents or individualized determinations based on assessed security risks. ER 124–25 ¶ 2-3; ER 104.

However, DOC policy permits an alternative to a strip and visual cavity search in certain circumstances. ER 133. If there is no secure area present for a strip search, then two thorough pat searches will be conducted instead. *Id*. In addition, strip searches are not conducted during the course of off-island transportation if prohibited by court order. ER 72, 104. An example of such a court order granted to an SCC resident who was represented by counsel states:

> IT IS FURTHER ORDERED that Mr. Herzog be transported without a strip and/or cavity search from the Department of Corrections, Department of Social and Health Services, and/or the King County Correctional Facility absent reasonable suspicion of contraband.

Order of Transportation at 2, *In re the Detention of Herzog*, No. 00-2-15307-4 SEA (King County Super. Ct. Nov. 21, 2001). Addendum at 82-85.

Further, DOC policies exempt certain convicted criminals from the full restraint policy. ER 131 ¶¶ III.A.2., .3.a. The policy does not require restraints for minimum security offenders transferred to a more restrictive facility without a loss of custody, i.e. for medical reasons, law library visits. ER 131 ¶ A.3.a. Neither DOC nor SCC make any individualized assessment of risk to determine whether to apply these restraints. ER 104 ¶ 4. This failure to make an individualized determination violates the statutory procedures for resident escorted leave that require the DSHS superintendent, or designee, to "determine the use and type of restraints necessary for *each escorted leave on an individual basis*." WAC 388-

880-110 (emphasis added).

C. Mr. Hoisington Is Subjected to Two Strip and Visual Body Cavity Searches and Is Shackled in Full Restraints Each Time He Travels Off-Island to Receive Necessary Medical Care.

Between 2005 and 2009, Mr. Hoisington has had eight escorted leaves off-island to receive necessary medical care. ER 73. Pursuant to SCC policy and the agreement between DSHS and DOC, SCC and DOC staff have subjected Hoisington to at least 16 strip and visual body cavity searches during eight off-island medical visits between 2005 and 2009. *See* ER 73; ER 109–10 ¶¶ 8, 17. DOC officers conducted the escorts in the following manner: under watch of two DOC correctional officers, Hoisington must remove all his clothes, lift his genitals, bend over and spread his buttocks. ER 252 ¶ 5.7. Once the search is finished, he must put on a pair of blue coveralls provided by DOC officers. ER 252 ¶ 6.6. DOC correctional officers then place Mr. Hoisington in leg irons and waist restraints to which his handcuffs are attached. ER 253 ¶ 6.7. The DOC guards then place him in a transport van along with two DOC correctional officers and one SCC officer. ER 109. These shackles are so restrictive that Hoisington cannot move his hands more than three inches. ER 56. The shackles are so tight that they cause bruising on Mr. Hoisington's wrists and ankles, and leave him with no feeling in his hands. ER 110 ¶ 18. On one occasion, he remained shackled for nearly seven hours. ER 112.

At the ferry dock, the leg irons are removed, and Mr. Hoisington is placed onto a ferry in an isolated area reserved for SCC residents. ER 109 ¶ 12. After the ferry ride, the DOC correctional officers replace his leg irons. ER 109 ¶ 13. Two DOC guards stay beside him during this entire off-island trip, and never leave his side, accompanying him into the doctor's office for every procedure. ER 110 ¶ 16. When Mr. Hoisington asked why extensive restraints were necessary, he was told the measures were in place because it was "DOC Policy." ER 110 ¶ 20.

Mr. Hoisington remains in belly chains and leg irons until he is returned to the SCC and the DOC officers release him to the SCC staff, where he is again forced to strip, lift his genitals, and spread his buttocks to be examined, this time by SCC staff. ER 254 ¶ 6.20. When Mr. Hoisington has asked SCC staff about the necessity of strip searches, he was told that it was SCC policy to strip search all residents coming into and leaving the SCC. ER 254 ¶ 6.22.

Although these searches are supposed to be conducted in a manner that gives the residents as much privacy as possible, the door to the search room is always open and as many as 6 staff persons have been present while he is forced to stand naked and expose his body cavities for inspection. ER 110 ¶ 22. Mr. Hoisington has described the strip and visual body cavity searches to be humiliating and degrading. ER 110 ¶¶ 21, 23. Though he has been subjected to strip and visual

body cavity searches numerous times, he has never gotten used to it. ER 110 ¶ 21.

Despite the full shackling and constant supervision by two DOC officers, Defendants assert that the outgoing strip search is necessary to protect DOC officers and others who may come into contact with a particular resident. ER 136 ¶ 4. Similarly, despite full restraints and continuous supervision of the residents during transport, Defendants claim that the return strip search is necessary to prevent residents form smuggling contraband into the facility. ER 137 ¶ 11. However, no contraband has yet been discovered during the course of any of these searches. ER 12. In fact, the only evidence Defendants offered referencing the origin of contraband within the SCC suggested that SCC *staff members* and visitors, rather than residents, were responsible for smuggling in contraband. ER 190 n.3 (referring to and providing links to three newspaper articles). SCC admits that during his time at SCC, Mr. Hoisington has not assaulted or attempted to assault anyone, attempted to escape, and has not attempted to transport contraband. ER 75–76 ¶¶ 4–7; ER 106–07 ¶¶ 4–7.

D. The Proceedings Below.

Faced with the impossible choice of forgoing medical care or undergoing degrading, humiliating, and painful treatment to receive medical care unavailable in the SCC, Mr. Hoisington filed a pro se complaint under 42 U.S.C. § 1983

against the state officials responsible for the operation of the SCC and the transportation of SCC residents. ER 245-56. Mr. Hoisington asserts in his complaint that the unreasonable and unnecessary strip search policy violates his Fourth Amendment right to privacy and his Fourteenth Amendment due process right to adequate care and individualized treatment as a civil detainee, ER 251 ¶ 5.1, and that the punitive DOC policies violate his Fourteenth Amendment right to adequate treatment. ER 251 ¶ 5.4–5.6.

Despite Mr. Hoisington's request for production of the DOC and SCC strip search policies, the Defendants have withheld the policies, citing security and contraband concerns. ER 74 ¶¶ 1–2. The magistrate judge was also unable to review the policies. ER 7 ("If there is a written policy governing the manner in which either or both of the strip searches are to be performed, it was not provided.").

The magistrate judge examined the blanket strip search policy against Fourth Amendment reasonableness, and the DOC's involvement against the Fourteenth Amendment substantive due process rights. ER 9. The magistrate judge did not address whether the strip and visual body cavity searches, harsh restraints, and other harsh treatment identical to those used on prisoners violated Mr. Hoisington's Fourteenth Amendment rights. ER 9-19. Mr. Hoisington's objections

to the Magistrate's Report and Recommendation included assertions that the magistrate did not sufficiently address the Defendants' failure to exercise professional judgment required under the Fourteenth Amendment, especially with regard to the effect of routine strip searches on the treatment environment, made all the worse because the SCC had ready alternatives in the form of a walk-through metal detector and a full body X-ray machine. ER 33, 58. In fact, SCC policies require residents to undergo a body scan and metal detector after each contact visit and a metal detector scan before a contact visit. *See* 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). Visitors to SCC can also be subject to metal detector screenings, body scan searches, canine searches, hands-on inspection of shoes, clothing and other items, and pat/frisk searches. *See id*. at 7, XII(C)(1)-(2).

The district court granted summary judgment to the defendants on the Fourth Amendment claim against strip searches and on the Fourteenth Amendment claim against DOC involvement in off-island transport. ER 2. The district court in its order did not address Mr. Hoisington's broader Fourteenth Amendment claims. *Cf*. ER 1-2. Mr. Hoisington appeals the district court's summary judgment order.

SUMMARY OF ARGUMENT

In order for Washington's sex offender commitment system to not run afoul of the ex post facto or double jeopardy clauses, the commitment must be civil in nature and non-punitive. Though commitment itself may be constitutional, conditions of confinement may be challenged as being unconstitutional or in violation of state statutory requirements. Mr. Hoisington's 42 U.S.C. § 1983 claim challenges certain conditions of his civil confinement as violating his Fourteenth and Fourth Amendment rights.

The district court erred when it granted summary judgment and dismissed the case without addressing all of Mr. Hoisington's Fourteenth Amendment claims. Defendant's policies mandating strip and visual body cavity searches, full restraints, and other treatment incident to off-island transport created unconstitutional conditions of confinement in violation of Hoisington's Fourteenth Amendment due process rights.

The district court erred when it concluded that the DOC's policies and participation in off-island transport did not violate the Fourteenth Amendment. Civil commitment must be non-punitive, and "[p]ersons who have been involuntarily committed are entitled 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). However, those responsible for the transportation policies did not exercise their professional judgment to develop an appropriate treatment environment—instead they simply adopted wholesale DOC's punitive policies and techniques.

The district court also erred by concluding that the strip searches were reasonable under the Fourth Amendment. The district court failed to acknowledge the reasonable alternatives available to SCC administrators that address their security concerns without subjecting residents to "one of the most grievous offenses against personal dignity and common decency." *Bell v. Wolfish*, 441 U.S. 520, 576–77 (1979). The district court was presented with ready alternatives to strip searches: a body-scanning x-ray machine already in use at the SCC, and pat-down searches used in other scenarios, either of which would be preferable to routine strip searches and come at *de minimis* cost. ER 58. Instead, the court found the current strip search policy to be reasonable despite Defendants' failure to present anything more than conclusory allegations that the strip search policy shares a "valid, rational connection" with legitimate security concerns. *Turner v. Safley*, 482 U.S. 78, 89 (1987) (internal quotation omitted).

On remand, Mr. Hoisington is entitled to proceed on his claims to seek prospective relief and monetary damages to remedy these constitutional violations.

Because of the complexity and weightiness of his claims, counsel should be appointed.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004). This Court will not affirm a grant of summary judgment if there is any genuine issue of material fact, or if the district court misapplied the substantive law. *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007). Evidence is to be viewed "in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor." *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

ARGUMENT

I. The District Court Erred in Granting Summary Judgment on Mr. Hoisington's Claims that Defendants Imposed Unconstitutional Conditions of Confinement, Violating His Fourteenth Amendment Due Process Rights.

A. Conditions of Civil Confinement Are Appropriately Tested Under the Fourteenth Amendment.

The state cannot simultaneously maintain a civil commitment system that is formally non-punitive and be immune from liability for unconstitutional conditions of confinement. *See Jones v. Blanas*, 393 F.3d 918, 933 (9th Cir. 2004). In that case, this Court stated:

> The state cannot have it both ways. If the confinement of a sexually violent predator is civil for the purposes of evaluation under the Ex Post Facto Clause, that confinement is civil for the purposes of determining the rights to which the detainee is entitled while confined. Civil status means civil status, with all the Fourteenth Amendment rights that accompany it.

Id. (discussing California's Sexually Violent Predator Act).

Thus, in order for the indefinite civil detention of sex offenders to be constitutional, their confinement must not be punitive. *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997). Individuals who have not been charged or convicted of a crime may not be treated the same as criminal detainees. *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982). Instead, noncriminal detainees "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id*. *See also Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (quoting *Youngberg*, 457 U.S. at 322).

Washington's commitment statute for sex offenders who have completed or about to complete their incarceration sentences has been determined to be civil in nature, designed to incapacitate and treat, and therefore is not an ex post facto law and does not violate the double jeopardy clause. *In re Detention of Young*, 857 P.2d 989, 996-1000 (Wash. 1993) (superseded in part by statute on other grounds); *cf. Seling v. Young*, 531 U.S. 250, 262-65 (2001) (rejecting "as-applied" challenge to validity of sex offender commitment statute that Washington Supreme Court had

previously upheld as civil in nature) (citing *In re Detention of Young*, 857 P.2d at 996-1000); *In re Detention of Campbell*, 986 P.2d 771, 774 (Wash. 1999) (same).

The Court made clear that while unconstitutional conditions of confinement will not invalidate an otherwise constitutionally valid civil commitment statute, courts "remain competent to adjudicate and remedy challenges to civil confinement schemes arising under the Federal Constitution." *Seling*, 531 U.S. at 265; *cf. In re Detention of Turay*, 986 P.2d 790, 812 (Wash. 1999) (remedy for unconstitutional conditions of confinement for civil detainee is not release but rather injunctive relief and/or damages award).

This Court has made clear that the due process clause of the Fourteenth Amendment provides residents committed under Washington's civil commitment statute have the right to enjoy a non-punitive environment, adequate care, and individualized treatment. *See Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (upholding injunctive order remedying violations of the due process clause of the Fourteenth Amendment); *see also Jones v. Blanas*, 393 F.3d at 931 ("'[T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees . . . have not been convicted' of a crime.") (quoting *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987)).

Mr. Hoisington seeks relief in this case for the violation of this due process principle.

B. The District Court Erred in Granting Summary Judgment and Dismissing the Case Without Addressing All of Mr. Hoisington's Fourteenth Amendment Claims.

Failure to address all of Mr. Hoisington's Fourteenth Amendment claims constitutes error. *See Frost v. Symington*, 197 F.3d 348, 354 (9th Cir. 1999) (finding reversible error where the district court's summary order only considered a pro se plaintiff's First Amendment claim but failed to address his Fourteenth Amendment claim). In *Frost*, a pro se prisoner litigant filed suit under 42 U.S.C. §§ 1983 and 1985 for violations of his First and Fourteenth Amendment rights. *Id*. at 352. On cross-motions for summary judgment, the district court, without addressing his Fourteenth Amendment claim, found that Frost's First Amendment rights had not been violated, that the defendants were entitled to qualified immunity, and granted summary judgment to the defendants. *Id*. at 353.

In its de novo review of the grant of summary judgment, this Court noted that it must construe Frost's claims liberally because of his pro se prisoner status. *Id*. at 352 (citing *Franklin v. Murphy*, 745 F.2d 1221, 1235 (9th Cir. 1984) (holding that a pro se prisoner litigant's pleadings must be construed liberally on a motion for summary judgment)). This Court found that the district court erred by

not considering Frost's Fourteenth Amendment claims, and in light of unrebutted evidence regarding the violation of his Fourteenth Amendment rights, this Court reversed, and on remand directed the district court to "consider whether the Defendants' actions satisfied the minimum procedural safeguards required by the Due Process Clause." *Frost*, 197 F.3d at 354.

A similar error occurred in the court below. The district court adopted the Magistrate's Report and Recommendation, which limited its consideration to two issues: "(1) whether SCC's blanket strip search policy violates Mr. Hoisington's Fourth Amendment rights; and (2) whether being placed under the control of DOC officers during off-island transports violates Mr. Hoisington's Fourteenth Amendment right to non-punitive conditions of confinement." ER 9. However, Mr. Hoisington also claimed that the SCC blanket strip search policy violated his Fourteenth Amendment rights, and more broadly, that the defendants' blanket strip and visual body cavity search, their blanket restraint policy, and treatment incident to transportation off-island violated his due process rights under the Fourteenth Amendment. ER 251-52, 254-55. Perhaps inartfully expressed,[5] his complaint

[5] Though Mr. Hoisington is not a prisoner, the liberal construction rules that apply to pro se prisoner litigant complaints should apply to an involuntarily civilly committed pro se litigant. In the seminal case establishing the general principle that pro se prisoner complaints should be liberally construed, the Court held that "[w]hatever may be the limits on the scope of inquiry of courts into the internal

nevertheless makes clear that the strip and visual body cavity searches, use of full restraints, and harsh treatment during transport are being challenged under the Fourth and Fourteenth Amendments. *Id*. The court's failure to discuss the policies regarding searches, restraints, and treatment during transport as challenges to conditions of confinement under the Fourteenth Amendment due process clause is error.

As the next section demonstrates, consideration of his claims under the Fourteenth Amendment demonstrates that this error requires reversal of the summary judgment grant.

C. Defendants' Policies Mandating Strip and Visual Body Cavity Searches, Full Restraints, and Other Treatment Incident to Off-Island Transport Create Unconstitutional Conditions of Confinement, Violating Mr. Hoisington's Fourteenth Amendment Due Process Rights.

As established above in Part I.A., *supra* at 17 - 19, conditions of confinement for those civilly detained are appropriately tested under the

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administration of prisons, allegations such as those asserted by the petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence." *Haines v. Kerner*, 404 U.S. 519, 520 (applying liberal construction to pro se pleadings in the face of a motion to dismiss). This Court has extended the reasoning in *Haines* to apply the liberal construction rule to pro se prisoner complaints in the summary judgment context. *See Franklin*, 745 F.2d at 1235; *Frost*, 197 F.3d at 352. Because of the similar situation that civilly committed residents find themselves in – they are confined and typically have limited access to legal and other resources – the liberal construction rules should be applied to civilly committed persons who appear pro se.

Fourteenth Amendment.[6] *See Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (involuntarily committed person retains Fourteenth Amendment liberty interest); *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004) (conditions of civil confinement tested under the more protective Fourteenth Amendment). Policies establishing conditions of confinement must be reasonably related to the detention facility's legitimate objectives. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). These policies must reflect the proper exercise of professional judgment. *Youngberg v. Romeo*, 457 U.S., 307, 323 (1982). Further, policies that subject a civilly committed resident to conditions identical to, similar to, or more restrictive than those under which a pretrial criminal detainee are held are deemed presumptively punitive. *Cf. Jones*, 393 F.3d at 934 (discussing rights of individual confined awaiting adjudication under civil commitment process).

[6] Conditions of confinement for convicted criminals are generally governed by the Eighth Amendment. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 319 (1986) (convicted criminals may be held under punitive conditions because they have been convicted of a crime). Though civil detainees are sometimes treated under the same test as pretrial detainees, we argue in Part II.A., *infra* at 33, that civil detainees ought to be treated differently than pretrial detainees under the Fourth Amendment.

1. The Policies Mandating Strip and Visual Body Cavity Searches and Full Restraints Are Not Reasonably Related to Legitimate Civil Commitment Objectives in Light of Readily Available Alternatives and Instead Reflect an Exaggerated Response to the State's Security Concerns.

This Court has long recognized that "[t]he feelings of humiliation and degradation with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute." *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989). Visual body cavity searches "represent one of the most grievous offenses against personal dignity and common decency." *Bell*, 411 U.S. at 576-77. Exposing one's nude body to strangers for visual inspection by force undeniably causes feelings of humiliation and degradation. *See Giles v. Ackerman*, 746 F2d 614, 617 (9th Cir 1984) (per curiam) (overruled on other grounds by *Hodgers-Durgin v. de la Vina* 199 F3d 1037, 1041 (9th Cir 1999) (en banc); *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute."). Thus, a policy requiring strip searches should be implemented only when the need for such a search is particularly great. *Bell*, 441 U.S. at 576-577.

In the criminal context, in order for a confinement policy or regulation to be upheld, the state must demonstrate that the policy is "reasonably related to a

legitimate penological interest." *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).[7] The *Turner* reasonableness standard, in the civil commitment context, requires that policies and regulations that burden fundamental rights be reasonably related to legitimate *civil commitment* objectives. *Cf. Youngberg*, 457 U.S. at 321-22 (1982) (emphasizing more considerate treatment and conditions of confinement required for noncriminal detainees than criminals"); *Jones v. Blanas*, 393 F.3d at 934 (same). The relevant *Turner* factors, modified to reflect the civil confinement context, are as follows:

> (a) whether there is a "valid, rational connection" between the regulation and a legitimate and neutral governmental interest put forward to justify it . . . ;
> . . .
> (c) whether and the extent to which accommodation of the asserted right will have an impact on . . . [civil commitment] staff, on . . . [residents'] liberty, and on the allocation of limited . . . [civil commitment facility] resources, which impact, if substantial, will require particular deference to . . . [civil commitment facility] officials; and

[7] While this Court has applied *Turner* to analyze criminal detainees Fourth Amendment claims, we address it in the case that this Court find that the rules articulated in *Turner* apply to civil detainees. As the District Court noted, "the holding in [*Bull v. City of County of San Francisco*, 494 F.3d 964 (9th Cir. 2010)] *Bull* is narrowly applied 'only to detainees classified to enter the general corrections facility facility population." 971. Furthermore, the Supreme Court has not held that the Fourth Amendment's application to jails and prisons is subject to the more deferential analysis of *Turner v. Safley*, 482 U.S. 78 (1987), which applies "only to rights that are 'inconsistent with proper incarceration.' " *Johnson v. California*, 543 U.S. 499, 510 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)) (emphasis in original).

> (d) whether the regulation represents an "exaggerated response" to . . . [civil commitment facility] concerns, the existence of a ready alternative that fully accommodates the . . . [residents'] rights at *de minimis* costs to valid . . . [civil commitment] interests being evidence of unreasonableness.

Id. at 89-91 (modifications added).[8] Although prison officials are accorded deference in fashioning regulations, to satisfy the factors laid out in Turner, prison officials must provide something more than "mere assertions of unfulfilled security objectives." *May v. Baldwin*, 109 F.3d 557, 564-65 (9th Cir. 1997); *see also Thornburgh v. Abbott*, 490 U.S. 401,414 (1989) (review of prison rules is not "toothless" analysis that merely requires the government to articulate some rational for a rule). The Court has held that "deference must be given to the officials in charge of the jail unless there is 'substantial evidence' demonstrating their response to the situation is exaggerated." *Florence* 10-945, 2012 WL 1069092 at 8 (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984). Here, substantial evidence exists that the defendants' policies are exaggerated responses.

[8] As discussed in the Magistrate's Report and Recommendation, the omitted Turner factor, "whether there are alternative means of exercising the right that remain open to prison inmates," is less relevant here. ER 15 n.4 (citations omitted).

With regard to the first factor, an invasive strip and visual body cavity search is likely to reveal the existence of weapons and other contraband, the stated reason for the search. ER 136 ¶ 4.

With regard to the second factor, ready alternatives exist to achieve the SCC and DOC's objectives. First, the existing DOC policy allows for two thorough pat searches in lieu of a strip search in "areas without a secured area for a strip search." ER 133. Second, a full body x-ray scanner and a metal detector, already mandated by SCC policy for contact visits,[9] can achieve SCC and DOC's security objectives. The magistrate judge noted that "[d]efendants did not specifically address the impact on SCC resources if the strip search policy were eliminated." ER 16. Accommodating Hoisington's right to be free from humiliating and degrading strip and visual body cavity searches in order to receive necessary medical care comes at minimal cost to the defendants.

Finally, the existence of these ready alternatives which do not require significant additional resources demonstrates that this is an exaggerated response. A policy that represents an exaggerated response to security concerns is an

[9] *See* 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).

unnecessary burden on fundamental rights. *See Turner*, 482 U.S. at 87; *Florence*, 10-945, 2012 WL 1069092 at *8.

The district court misapplied the *Turner* test by not considering the existence of ready alternatives that would achieve defendants' security objectives at minimal cost while saving Mr. Hoisington from unnecessary, degrading procedures. Further, the existence and efficacy of these ready alternatives demonstrate that the blanket strip and visual body cavity search is an exaggerated response and therefore unreasonable. It was improper for the district court to give deference to SCC and DOC officials under these circumstances. *See Turner*, 482 U.S. at 87

2. The Adoption of Policies Mandating Strip and Visual Body Cavity Searches Is Punitive and Violates the *Youngberg* Professional-Judgment Standard.

This Court has found that when a civil detainee "is confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held, we presume that the detainee is being subjected to 'punishment.'" *Jones*, 393 F.3d at 932 (citing *Sharp*, 233 F.3d at 1172-73). In 1983, Washington state forbid strip and cavity searches of pretrial detainees booked into holding, detention, or local correctional facilities absent a warrant or reasonable suspicion. *See* RCW 10.79.060 et seq. SCC residents such as Mr. Hoisington are treated worse than pretrial detainees and instead are treated like

prisoners, thus raising the presumption that strip and visual cavity searches are punitive. *See Jones*, 393 F.3d at 932.[10]

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 only 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 actually did not base the decision on such a judgment." 457 U.S. at 323. Where more than one professional acceptable choice exists, the court does not get to choose among them. *Id*. at 321.

However, there is a constitutional limit to the deference afforded to officials' judgment. "The principle that courts must provide wide latitude to prison policies needed to maintain institutional order and security necessarily presupposes that the administrators have crafted those policies with *careful deliberation*." *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 713 (9th Cir. 1989) (emphasis added and

[10] In the Eighth Circuit, rights and treatment of civil committees are analogized to those of pretrial detainees. *See Serna v. Goodno*, 567 F.3d 944, 948 (8th Cir. 2009). If this Court adopted this approach, the presumption that strip searching civil committees is punishment would be even stronger because of the protections afforded to pretrial detainees in Washington state.

internal citation omitted) (*overruled on other grounds by Act Up!/Portland v. Bagley*, 971 F.2d 298 (9th Cir. 1992)). As this Court stated:

> Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point.

Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990). No lesser standard could apply in the context of non-criminal detainees. *See Youngberg*, 457 U.S. at 321–22.

Although noncriminal detainees are entitled to more considerate treatment than criminals, the defendants have simply adopted wholesale the punitive DOC transportation policies rather than formulating non-punitive security policies appropriate for the civil commitment environment. Courts in this circuit have found that adopting blanket transportation restraint policies that apply to all inmates, regardless of classification including civil detainees, constituted a failure to exercise the required *Youngberg* professional judgment "in the absence of any evidence that SVPs pose the same security risks as penal inmates." *Noonkester v. Tehama Cty. Sheriff*, 2011 WL 2946360 at *3 (E.D. Cal. 2011); *Sumahit v. Parker* 2009 WL 2879903 at *10-11 (E.D. Cal.), *report and recommendation adopted by* 2009 WL 4507723 (E.D. Cal.) (holding same).

Further, this Court has found that "a restriction is punitive where it is . . . employed to achieve objectives that could be accomplished [with] alternative and less harsh methods" *Jones v. Blanas*, 393 F.3d 918, 933–34 (9th Cir. 2004) (internal citations and quotation marks omitted). As detailed in our discussion of the *Turner* factors in the previous section, less harsh methods are available; yet the defendants have made no effort to develop less restrictive policies with regard to off-island transport.

Instead, they imposed a policy that mandated strip and visual body cavity searches for off-island transport, despite the fact that the district court, in *Turay v. Richards*, concluded that routine strip searches were destructive of the treatment environment at SCC, noting that the clinical director of the SCC called the strip searches "an abomination." Addendum at 43. The remedial order enjoining routine strip and visual body cavity searches following contact visits district court was upheld by this Court. *Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000). Despite having developed alternative, less intrusive search procedures following contact visits discussed above,[11] the SCC has failed to develop less intrusive transport policies or to adequately justify them. While it is possible for presumptively

[11] *See* 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).

punitive policies to be justified by a professional judgment informed by specific evidence,[12] appellees have offered no such judgment here. The Defendants merely recite conclusory assertions that the punitive policies enhance safety, with no consideration to adverse clinical consequences.

II. The District Court Erred in Granting Summary Judgment on Mr. Hoisington's Claim that the Blanket Strip and Visual Body Cavity Policy Violated His Fourth Amendment Rights.

Under the Fourth Amendment, visual body cavity searches of persons held in civil custody must be grounded in reasonable suspicion that the resident targeted possesses contraband. The defendants' 16 humiliating and degrading visual body cavity searches of Mr. Hoisington before and after transportation for medical visits at SCC were lawful under the Fourth Amendment because the defendants did not have any reasonable suspicion that Mr. Hoisington had contraband, and rather conducted these searches pursuant to blanket *correctional* policy. Even if this Court finds that reasonable suspicion is not required for civil detainees, the Magistrate erred in granting summary judgment to defendants and finding the search reasonable, because it failed to consider the scope of the intrusion of the search, easily available and less intrusive alternatives to visual cavity strip

[12] *See Dudgeon v. Cunningham*, 2011 WL 4001099 at *10-11 (W.D. Wash. 2011) (noting that restriction regarding photos was more restrictive than for prisoners but accepting treatment-based professional opinion), *report and recommendation adopted by* 2011 WL 4007326 (W.D. Wash. 2011).

searches, and because the blanket DOC strip search policy used by defendants was an arbitrary and exaggerated response to defendants safety concerns.

A. The Fourth Amendment Requires Individualized Suspicion Before a Civilly Committed Resident May Be Subjected to a Strip and Visual Body Cavity Search.

Civil custody of sex offenders rests on a critical distinction between treatment and punishment. Washington holds Hoisington in civil custody as a patient for the purposes of treatment and public protection and not for the purpose of punishment. Although Mr. Hoisington is not subject to punishment, the housing of sex offenders, like the housing of immigrants detained for civil immigration violations and involuntary committed psychiatric patients, who also are not subject to punishment, raises legitimate institutional safety and security concerns. The Fourth Amendment reasonable suspicion standard is entirely consistent with these institutional concerns. As courts in this Circuit have consistently recognized, visual body cavity searches of civil detainees must be justified by individualized suspicion.

1. Persons Held in Civil Custody Are Not Subject to Punishment

As described in Section I.A., *supra* at 17, persons held in civil custody cannot be subjected to punishment. The Supreme Court and this Court, has made clear that civilly committed sex offenders cannot be subject to punishment or

punitive conditions of confinement, but rather can only be held for treatment. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Seling v. Young*, 531 U.S. 250, 263, 265 (2001) (noting prior judicial determination that Washington's sexually violent predator act is "civil in nature, designed to incapacitate and to treat" and rejecting an "as applied" analysis to determine if a particular scheme of confinement is punitive). Thus, under the Fourteenth Amendment, civilly committed detainees cannot be subjected to conditions that amount to punishment.[13] *Jones*, 393 F.3d at 932.

Consistent with these Constitutional principles, Washington state law provides that the goal of civilly committing sex offenders in SCC is to provide "long-term" rehabilitation for a population that requires "different treatment modalities." RCW 71.09.010. The Ninth Circuit has underscored that SCC facilities must provide "individualized treatment and adequate care" for residents who had already completed their criminal sentences. *Sharp v. Weston*, 233 F.3d 1166 (2000); RCW 71.09.080(3).

2. Different Constitutional Standards Apply to Persons Held in Civil Custody than Apply to Prisoners Charged or Convicted of a Crime

[13] A person held in custody after being found not guilty by reason of insanity is "not a 'prisoner' subject to punishment." *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001) (quoting *Bell*, 441 U.S. at 535).

The district court erred by applying the wrong constitutional standards in analyzing Mr. Hoisington's claims. The court misapplied Fourth Amendment standards governing the rights of convicted prisoners and pre-trial detainees, instead of looking to the relevant legal principles governing conditions for civil detainees, like Mr. Hoisington, who have not been charged with a crime. ER 9-10.

Different constitutional standards apply to sex offenders held in civil custody than to individuals detained incarcerated in the criminal justice system. *See Hendricks*, 521 U.S. at 368 (finding that an essential component of civil confinement of sex offenders is that they are "segregated from the general prison population and afforded the same status as others who have been civilly committed"); *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."); *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004). Indeed, this Court and courts in this Circuit have made clear that an individual civilly committed is entitled to greater constitutional protections in their conditions of confinement as those afforded to an individual accused but not convicted of a crime and criminally convicted prisoners. *See, e.g.*, *Jones*, 393 F.3d at 932 (holding that a civil detainee is entitled to "more considerate treatment" and less restrictive

conditions than pre-trial detainees and convicted criminals); *Bacon v. Kolender*, Civ. No. 05-0310, 2007 WL 2669541 (S.D.Cal.2007). This Court has specifically recognized individuals committed to the civil custody of the SCC are "entitled to 'more considerate treatment and conditions of confinement '" than "a prison inmate." *Sharp v. Weston*, 233 F.3d 1166, 1172-73(9th Cir.2000) (internal cites omitted) (finding that *Youngberg* required that individuals civilly confined at a commitment center receive "more considerate" treatment than inmates at the correctional center in which the commitment center was located).

Accordingly, this Court has recognized that the Fourth Amendment rights of involuntary civilly committed detainees cannot be equated with the limited rights of prisoners or pretrial criminal detainees. *Hydrick v. Hunter*, 500 F.3d 978, 998 (9th Cir. 2007), *vacated and remanded on other grounds*, 129 S.Ct. 2431 (2009) ((holding that "the rights afforded prisoners set a floor for those that must be afforded" sexually violent predators subject to civil detention). This Court in *Hydrick* underscored that detained sex offenders "must, at a minimum, be afforded the rights afforded prisoners confined in a penal institution." *Id*.

Thus, courts in this Circuit have found unconstitutional strip search policies used for civil detainees when they have been identical to those used for individuals arrested or charged with a crime. *See, e.g, Bacon v. Kolender*, Civ. No. 05-0310,

2007 WL 2669541 (S.D. Cal. 2007) (denying defendant-jail officials motion for summary judgment on civilly committed sex offenders' constitutional challenge to jail strip search policy because defendants used identical policy for civil detainees and pre-trial criminal detainees). *See also Gomez-Lopez v. Ashcroft*, 393 F.3d 882 (9th Cir. 2005) (civilly committed immigration detainees cannot be criminally confined in a penal facility with a penal atmosphere). And consistent with the stronger Fourth Amendment protections afforded to civilly committed sex offenders, this Court has specifically recognized that strip searches that pass constitutional muster in a pre-trial context do not meet the minimal constitutional standards required in the civil commitment context. *Compare Turay v. Richards*, Addendum at 40, 41-43, *aff'd by Sharp v. Weston*, 233 F.3d 1166 (9th Cir. 2000) (enjoining strip searches of detainees before and after contact visits because they were destructive of the treatment environment at SCC) *with Bell v. Wolfish*, 441 U.S. 520, 558 (upholding rule requiring visual body cavity searches of pretrial detainees in federal correctional facilities after contact visits); *Cf. Bull v. City and Cty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) (upholding a blanket policy of strip searching all pre-trial arrestees before they enter San Francisco's general jail population).

Mr. Hoisington is not incarcerated as a result of a criminal conviction, and, the constitutionality of his continuing custody--after completion of his criminal sentence--is premised on treatment and protection of public, not punishment. Mr. Hoisington's Fourth Amendment claim, like the excessive-force claim of an involuntarily committed state hospital patient, "does not fit neatly into an analysis based on status as an arrestee, a pre-trial detainee, or a prisoner." *Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001). As search, he "must, at a minimum, be afforded the rights afforded prisoners confined in a penal institution," *Hydrick*, 500 F.3d at 998.[14]

3. Visual Body Cavity Searches of Persons in Custody Under a Civil Commitment Requires Individualized Suspicion

The district court further erred by failing to recognize that visual body cavity searches of civilly committed sex offenders, as well as all other persons in civil custody, must be justified by individualized reasonable suspicion. Instead, the Court erroneously analyzed Hoisington's claims under the "established case law as it pertains to pretrial detainees" in the criminal justice system. ER 9. By doing so, it ignored the clear rules in this Circuit that require civilly detainees are entitled to

[14] As described in Section I,B., under the SCC strip search policy is also unconstitutional because Washington state law has more protective strip search policies for criminal and pre-trial detainees, because it prohibits suspicionless strip searches for such detainees. Wash. Rev. Code § 10.79.130(1)(a), (1)(b) (requiring "reasonable suspicion" or "probable cause" before strip searches).

greater constitutional protections than individuals charged with crimes, including individualized suspicion prior to strip searches. Absent any reasonable suspicion that Mr. Hoisington possessed contraband, the SCC and DOC policy violated Mr. Hoisington's Fourth Amendment right to be secure from an unreasonable search.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Privacy is the primary interest underlying the fourth amendment. *Katz v. U.S.*, 389 U.S. 347, (1967). However, "that amendment also protects persons against infringements of bodily integrity, *Winston v. Lee*, 470 U.S. 753, 761 (1985), and personal dignity, *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Jordan v. Gardner*, 986 F2d 1521, 1534 (9th Cir 1993). Strip searches, like any intrusion of a Fourth Amendment interest, are subject to "the Fourth Amendment's normal requirement of individualized suspicion." *Chandler v. Miller*, 520 U.S. 305, 318 (1997). "The demand for specificity in the information upon which policy action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21 n.8 (1968). An order to strip naked before a government official is a dramatic intrusion upon personal privacy and dignity that falls within "a category of its own demanding its own specific suspicions." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643

(2009). Thus, this Court and the U.S. Supreme Court have rejected that requirement only "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989). A strip search of a civil detainee amounts to such a significant intrusion on personal privacy and dignity, and the justification for that intrusion is so meager, that it must be justified by some form of suspicion.

This Court has consistently held that under the Fourth Amendment, civil detention centers must apply a reasonable individualized suspicion standard prior to strip searches in a range of contexts. While the Supreme Court recently held in *Florence* that searches of pre-trial detainees do not require reasonable suspicion prior to booking in a general jail population,[15] *see infra*, this Court and courts in

[15] The Supreme Court has applied the traditional Fourth Amendment inquiry into reasonableness in almost every possible setting, including not only jails and prisons, but also - for example - schools, *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009), borders, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and sensitive facilities such as airports, *Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam), where "the need for [particular searches] to ensure public safety can be particularly acute," *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000). The Court's Fourth Amendment doctrine accounts for the context of incarceration by treating it as a central component of the reasonableness of the individual's expectation of privacy in that unique setting. *Hudson*, 468 U.S. at 527; *Bell*, 441 U.S. at 559-60.

this circuit have consistently held that strip searches of civilly committed detainees require reasonable suspicion that an individual possesses contraband or a weapon:

(1) individualized suspicion is required for institutional, visual body cavity searches of civilly committed sex offenders, see, e.g., *Meyers v. Pope*, 303 Fed. Appx. 513, 516 (9th Cir.2008) (reversing summary judgment in suit brought by civilly committed sex offender against jail official defendants who engaged in routine strip searches without reasonable suspicion); *Jones v. Blanas*, No. CIV S-00-2811, 2008 WL 5411967 (E.D.Cal. 2008) on remand from *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004) cert denied. (strip searches of civilly committed detainee found unconstitutional in absence of reasonable suspicion); *Flores v. Fresno County Bd. of Sup'rs*, 2009 WL 179775 (E.D.Cal. 2009) (refusing to dismiss complaint brought by civil detainee classified as a sex offender challenging strip searches by jail official-defendants because they were unreasonable and unnecessary, and degrading in nature).

(2) individualized suspicion is required for strip searches of for individuals detained for civil immigration violations. *See, e.g., Refai v. Lazaro*, 614 F.Supp.2d 1103, 1116 (D.Nev. 2009) (finding a clearly established Fourth Amendment right a for non-admitted alien to be free from non-invasive, non-abusive strip searches absent requisite reasonable suspicion); *Tungwarara v. United States*, 400

F.Supp.2d 1213 (N.D.Cal. 2005) (holding that rights under the Fourth Amendment fall along a continuum, with United States citizens and resident aliens afforded the most protection," and strip searches performed on an alien in a detention facility without some level of suspicion was unconstitutional); *Wong v. Beebe* (Wong II), No. 01-718-ST, 2007 WL 1170621 (D.Or. Apr. 10, 2007) (holding that non-admitted aliens retained a Fourth Amendment right to be free from non-routine searches without reasonable suspicion at immigration detention centers); *Flores v. Meese*, 681 F.Supp. 665, 669 (C.D. Cal. 1988) (invalidating policy under which all juvenile aliens were subjected to strip searches without reasonable suspicion at an INS facility). *Cf. Adnan v. Santa Clara County Dept. of Corrections*, No. 4:02–CV–03451, 2002 WL 32058464 (N.D.Cal. 2002) (recognizing immigration detainee's claim that body cavity search was unreasonable).

(3) individualized suspicion is required for body cavity searches of individuals detained during border searches. *See, e.g., U.S. v. Gonzalez-Rincon*, 36 F.3d 859, 864 (9th Cir 1994) (strip searches and body-cavity searches of arriving aliens are "of course" non-routine, and unlike routine luggage searches and pat-downs and require reasonable suspicion); *Kirkpatrick v. City of Los Angeles*, 803 F2d 485, 489 (9th Cir 1986) (strictly applied standard of reasonable suspicion must be satisfied to justify a strip search at the border); *Huguez v. U.S.*, 406 F.2d 366,

374 - 376 (9th Cir. 1969) (holding body cavity search at a border crossing unconstitutional in violation of Fourth Amendment's protections against unreasonable searches) ("[I]n the case of a search of body cavities, there must be a clear indication of the possession of narcotics or a plain suggestion of the smuggling, which must be 'ver and beyond a mere suspicion") (internal cites omitted); *Rivas v. United States*, 368 F. 2d 703, 710 (9th Cir. 1966), *cert. denied* 386 U.S. 945 (1967) (requiring reasonable suspicion for body cavity search at border, and upholding search because defendant appeared under influence of narcotics and was a previously convicted and registered user of narcotics).[16]

Accepting defendant's argument that civil commitment centers may strip search any detainee without regard to the circumstances of individualized suspicion invites a sweeping intrusion upon individual privacy. Jail strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). As this Court has held, "[t]he feelings of humiliation and degradation associated with forcibly exposing one's

[16] *See also Martinez v. County of San Diego*, 962 F.2d 14 (9th Cir. 1992) (in the absence of reasonable suspicion that a particular prison visitor is attempting to smuggle drugs or other contraband, a strip search of the visitor violates the Fourth Amendment).

nude body to strangers for visual inspection is beyond dispute." *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006).

The Supreme Court's holding in *Florence v. Bd. of Chosen Freeholders of County of Burlington*, that pre-trial detainees may be subject to strip searches upon admission to the general jail population without reasonable suspicion, in a jail that included convicted criminals, is inapposite to this case and the law of this circuit requiring reasonable suspicion prior to strip searches of civil detainees. *Florence*, 10-945, 2012 WL 1069092 at 11-13 (U.S. Apr. 2, 2012). First, *Florence* addresses detainees held in the criminal justice system, and this Court has held that civilly committed detainees must be treated better than individuals in the criminal justice system, including pre-trial detainees and individuals committed of a crime. *See, e.g.*, *Jones*, 393 F.3d at 932 (holding that a civil detainee is entitled to "more considerate treatment" and less restrictive conditions than pre-trial detainees and convicted criminals).

Furthermore, the Court's reasoning in *Florence* is specific to considerations unique to detention facilities for criminal pre-trial detainees. In holding that jails could apply blanket strip search policies to individuals arrested for minor crimes, the Court relied on concerns specific to the criminal justice system and general jail population, finding that "the safety of jails would be severely compromised if

arrestees were not searched during the intake process." *Id*. The Court reasoned that jails were "unsanitary and dangerous places," and that they needed to screen admits was necessary to ensure no persons had gang-affiliated tattoos and that they did not suffer from any visible, possibly contagious health problems. *Id*. at 13. Defendants raised no similar concerns here.

Furthermore, the Court reasoned that a blanket strip search policy was warranted because jails "can be even more dangerous than prison because officials there know so little about the people they admit at the outset." *Id*. at 16. In contrast to the unknown risks posed by pretrial inmates, the SCC staff knows the plaintiff in this case who is being transported and searched; Hoisington has been confined at the facility on McNeil Island for over 10 years. ER 136. He has never been caught with contraband. ER 75, 106. Because SCC staff have a personal working knowledge of most of the residents housed on the Island, there is much less uncertainty about SCC residents than there was with the pre-trial detainees in *Florence*. Furthermore, the SCC officials' personal knowledge of detainees minimizes any risk of harm – if the staff encounters the residents on a regular basis, they have a more informed ability to use the reasonable suspicion standard, rather than apply a routine blanket strip search policy.

The Court in *Florence* also based its decision on concrete evidence on the record that showed that "people arrested for minor offenses have tried to smuggle prohibited items into jails, sometimes using their rectal cavities or genitals for the concealment." *Id.* at 14. The Court specifically pointed to evidence and concrete statistics demonstrating a risk that suspected criminals smuggle dangerous or illegal contraband from the public into jails during the intake process. It observed that strip searches in one County Jail in San Francisco, resulted in the discovery of "73 cases of illegal drugs or drug paraphernalia hidden in body cavities" including "handcuff keys, syringes, crack pipes, heroin, crack-cocaine, rock cocaine, and marijuana, a seven-inch folding knife, a double-bladed folding knife, a pair of 8-inch scissors, a jackknife, a double-edged dagger, a nail, and glass shards. *Id.* In contrast, SCC have never uncovered contraband during the course of any of these searches. ER 12. In fact, the only evidence Defendants offered referencing the origin of contraband within the SCC suggested that SCC staff members and visitors, rather than residents, were responsible for smuggling in contraband. ER 190 n.3 (referring to and providing links to three newspaper articles).[17]

[17] Federal agencies charged with detention of civil commitment similarly prevent suspicionless strip searches. The Department of Homeland Security, which is responsible for immigration detainees, permits strip searches "only where there is reasonable suspicion that contraband may be concealed on the person, or when there is reasonable suspicion that a good opportunity for concealment has

4. The District Court Erred Because Mr. Hoisington Was Strip Searched Without Any Evidence of Reasonable Suspicion.

The Fourth Amendment reasonable suspicion standard is less demanding than the requirement of probable cause. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (listing cases recognizing "the legality of searches and seizures based on suspicions that, although 'reasonable,' do not rise to the level of probable cause"); *Hunter*, 672 F.2d at 674 (noting that "the fourth amendment reasonableness standard allows [some] searches to be based on less than probable cause"). However, even under the less demanding "reasonable suspicion" standard, courts "usually require[] some quantum of individualized suspicion." *Skinner v. Ry. Labor Executives' Assoc.*, 489 U.S. 602, 624 (1989) (internal quotations omitted). As this Court has explained, the reasonable suspicion standard in a civil commitment context requires officials to base strip searches on specific objective facts and rational inferences they are entitled to draw from those facts in light of their experience, specifically directed to the person who is targeted for the strip search. *See Hunter*, 672 F.2d at 674-75.

In this case, defendants do not dispute that they had no reason to suspect that Hoisington was attempting to smuggle anything out of or into the SCC during his

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occurred." Immigration and Customs Enforcement Detention Standard: Searches of Detainees pt. 2, § 13 (2008).

off-island medical visits. The multiple invasive strip searches that Mr. Hoisington underwent at SCC was a clear violation of the Fourth Amendment, because there was no ”reasonable suspicion” that he was concealing anything in his body. Indeed, this point appears to be disputed; the defendants subjected Mr. Hoisington to more than 16 visual body cavity searches pursuant to a blanket policywithout any individualized suspicion that Mr. Hoisington was carrying contraband. ER 73, 109-10. To the contrary, defendants admit that during his time at SCC, Mr. Hoisington has not assaulted or attempted to assault anyone, attempted to escape, and has not attempted to transport contraband. ER 75–76, 106–07. Nonetheless, before and after each medical visit, defendants strip searched him merely for visiting his doctor. They require him to stand naked before officers, turn around, and lift his buttocks. ER 252 ¶ 5.7.

Requiring reasonable suspicion standard is consistent with institutional security concerns. Individualized circumstances may justify the substantially greater intrusion of a strip search or even a body cavity search. The ordinary searches described above may give rise to suspicion that a civil detainee is carrying contraband. Also, reasonable suspicion justifying such a search may arise from the nature of the off-island visit (such as with non-professionals or physical access to

contraband), the circumstances of the visit (as when it appears that the resident hid contraband), or the resident's prior history of possessing contraband on SCC.

Accordingly, this Court should reverse the district court's order granting summary judgment in favor of the defendants, and remand for a proper analysis of Hoisington's claim under the correct Fourth Amendment standard.

B. Even if Individualized Suspicion Is Not Required to Justify a Visual Body Cavity Search of a Civilly Committed Resident, There Are Genuine Issues of Material Fact Whether the Search Was Reasonable.

Even if individualized suspicion is not required to justify defendants' multiple highly intrusive visual body cavity searches prior to and following Mr. Hoisington's fully supervised and restrained off-island transports, the district court erred in holding that this search was reasonable. ER 17. The Supreme Court in *Bell* "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. *Bell* also presupposes consideration of less intrusive alternatives to visual body cavity searches. *See id.* at 559 n.40. The district court erred in granting summary judgment that the search was reasonable because there are genuine issues of material fact whether there were less intrusive alternatives and whether defendants properly considered them.

1. Legal standard for assessing reasonableness of strip search policy requires balancing restriction of Hoisington's constitutional rights with valid civil commitment interest.

To assess whether an institutional strip search policy is reasonable under the *Bell* balancing test, courts are required to assess 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. *Bell*, 441 U.S. at 559. In light of the rehabilitative purpose of civil confinement and the varying security concerns of civil detention, civil detainees are entitled to greater constitutional protections than individuals charged with or convicted of a crime confined in jails or prisons.[18] The factors courts must consider under *Bell* include "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." *Bell*, 411 U.S. at 559. However, the Court made clear that "[c]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Id.* at 545.

[18] *See e.g. Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("[P]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish"); *Sharp v. Weston*, 233 F.3d 1166 (2000) (SCC residents are entitled to non-punitive conditions of confinement and adequate treatment that would give them "a realistic opportunity to be cured or improve the mental condition for which they were confined.").

In the pre-trial and prison context, the Ninth Circuit has required that where a detention facility restricts detainees constitutional rights, a court must apply the principles articulated in *Turner v. Safely*, 482 U.S. 78 (1987). *See Bull v. City of County of San Francisco*, 494 F.3d 964, 971. In *Turner*, the Supreme Court observed that, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Thus, the Court reasoned that when a prison regulation impinges on inmates' constitutional rights, the prison must establish that the regulation is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

2. The district court erred by failing to engage in a factually complete or reasoned analysis of the invasiveness of the strip search or the availability of less intrusive alternatives in evaluating Hoisington's strip search under the Fourth Amendment.

The district court erred in applying the *Bell* test by failing to fully consider the first two factors of the *Bell* test, or the invasion of [Hoisington's's] personal rights, and "the manner in which the search is conducted, *Bell*, ___ and in effect put nothing in the *Bell* balance against the governmental interests in the search. As discussed above, this Court has long recognized that "[t]he feelings of humiliation and degradiation with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute." *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989). Visual body cavity searches "represent one of the most grievous

offenses against personal dignity and common decency." *Bell*, 411 U.S. at 576-77. Exposing one's nude body to strangers for visual inspection by force undeniably causes feelings of humiliation and degradation. *See Giles v. Ackerman*, 746 F2d 614, 617 (9th Cir 1984) (per curiam) (overruled on other grounds by Hodgers-Durgin v. de la Vina 199 F3d 1037, 1041 (9th Cir 1999) (en banc)); Way v. County of Ventura, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers for visual inspection is beyond dispute.").

The Fourth Amendment's "overriding function" is to "protect personal privacy and dignity against unwar-ranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767 (1966). The "meaning" of a strip search when specifically demanded by the government, as well as "the degradation its subject may reasonably feel, place a search that intrusive into a category of its own demanding its own specific suspicions." Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2643 (2009). Jail strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." Mary Beth G. v. Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983). It is an "invasion of personal rights of the first magnitude." Chapman v. Nichols, 989 F.2d 383, 395 (10th Cir. 1993).

The power to safeguard the privacy of one's body "safeguards human dignity as defined by modern society." Daniel J. Solove, A Taxonomy of Privacy, 154 U. Pa. L. Rev. 477, 537 (2006). Individuals ordered to expose themselves can "experience a severe and sometimes debilitating humiliation and loss of self-esteem." Id.

Despite the recognition of the intrusive nature of visual body searches, the district court dismissed the scope of the search and manner of the search in one brief paragraph that omitted key details of the search and labeling it as "not invasive." ER 11. In its brief "analysis," the court failed to acknowledge the detail of Hoisington's "exposure of his nude body" for inspection when analyzing the intrusiveness of the search. In analyzing the first two *Bell* factors, the court failed to consider the fact that in his pre-medical visit search, Hoisington is *required* to remove all his clothes, lift his genitals, bend over and spread his buttocks in front of two DOC Correctional Officials. ER 11, 252. Nor did the Court acknowledge or analyze the search upon his return from his supervised medical visit, Hoisington is again forced to remove all of his clothes in a room with the door open, lift his genitals, and spread his buttocks to be examined. ER 254. By failing to consider these details and dismissing the invasiveness of the search, the magistrate judge and district court erred by giving due weight to these facts, and analyze them in light of this Court's clear findings on the intrusiveness of visual body cavity

searches. *See, e.g.*, *Kennedy v. Los Angeles Police Dept*, 901 F2d 702, 711 (9th Cir 1989) ("the intrusiveness of a body cavity search cannot be overstated").

This wholesale intrusion on personal privacy and dignity is not outweighed by an interest in deterring and detecting the smuggling of contraband into jails. That is an important interest, but not one that these policies advance materially.

3. Defendants did not carry their burden of establishing the absence of a genuine issue of material fact whether there were less intrusive alternatives to visual body cavity searches that would have a de minimis impact on security concerns.

Defendants did not carry their burden under Fed. R. Civ. P. 56(c) to prove that "there is no genuine issue as to any material fact" whether there were any less intrusive alternatives to visual body cavity searches, and the Magistrate erred by not considering these alternatives. The strip search policies used at SCC, read in the light most favorable to Hoisington, the non-moving party, *Sluimer v. Verity, Inc.*, 606 F.3d 584, 587 (9th Cir. 2010), demonstrate that there were less intrusive alternatives to visual body cavity searches upon departure and return from the SCC for medical visits. To the extent that there is a reasonable prospect that SCC residents will-or even can- attempt to engage in smuggling, the SCC have numerous alternatives at their disposal to detect contraband. There are at least three clear, less intrusive alternatives to the strip and visual cavity search procedure that

were raised to the lower court which still meet the security needs of SCC, while protecting the interests of the residents.

First, the DOC transport policy governing off-island transport at SCC authorizes less intrusive searches to strip search policy permits correctional officers to conduct alternative searches as an alternative to a strip and visual cavity searches. If there is no secure area present for a strip search, the policy requires that two thorough pat searches will be conducted instead. ER 133.

Second, a full body-scanning x-ray scanner and metal detector are located in the SCC and could be used in lieu of the strip search to satisfy the security concerns at SCC. ER 58. In fact, SCC policies require residents to undergo a body scan and metal detector after each contact visit, and a metal detector scan before a contact visit.[19] Third, SCC also utilizes canine searches, hands-on inspection of shoes, clothing and other items, and pat/frisk searches for visitors prior to contact visits, in addition to metal detector screenings, body scan searches.[20] Each of these alternatives would be less intrusive than routine strip searches and visual body

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[19] *See* 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). Visitors to SCC can also be subject to metal detector screenings, body scan searches, canine searches, hands-on inspection of shoes, clothing and other items, and pat/frisk searches. *See Id*. at 7, XII(C)(1)-(2).

[20] *Id*. at 7, XII(C)(1)-(2).

cavity inspections, and come at de minimis cost. ER 58. The Magistrate erred by failing to consider these ready alternatives in its granting defendant's summary judgment motion.

Because these search mechanisms are already available to and employed by SCC and DOC, adopting them prior to or after off-island transports would not have a significant impact on SCC staff or on the allocation of limited SCC resources, while signigificantly minimizing the deprivation of Hoisington's liberty interests. These are all already options to SCC and DOC officials. Rather, these alternatives would promote the resident's liberty interests, they are less costly and labor-intensive. More likely, would likely make the transport process less burdensome and more efficient. Ultimately, in light of the other factors, any burden on the SCC facility to implement these alternatives would not substantially outweigh the constitutional protections they must afford the residents in their care and under their treatment.

Courts in this circuit have found that similar strip-search policies applied to detainees contravened the Fourth Amendment because it was excessive in relation to government's legitimate safety interests when little effort has been made to mitigate the scope and intensity of the searches and less intrusive alternatives existed. *See, e.g. Mashburn v. Yamhill County*, 698 F.Supp.2d 1233 (D. Or. 2010).

The Magistrate aggravated the errors of its one-sided balance of defendant's interest by failing to consider whether there were any less intrusive alternatives to visual body cavity searches. In *Bell*, the Supreme Court assumed that "the existence of less intrusive alternatives is relevant to the determination of the reasonableness" of a visual body cavity search. 441 U.S. at 559 n.40. While courts should be conscious of judicial deference afforded to corrections officials, the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns." *See also Turner*, 428 U.S. at 90.

III. On Remand, Appellant Is Entitled to Proceed on His Fourteenth and Fourth Amendment Claims to Seek Prospective Relief and Monetary Damages to Remedy these Constitutional Violations.

A. The Eleventh Amendment does not bar prospective relief

State sovereign immunity and the Eleventh Amendment generally bar suits brought by individuals against a state without its consent or congressional abrogation. *See College Savings Bank v. Florida Prepaid Secondary Education Expense Board*, 527 U.S. 666, 669-70 (1999). The Supreme Court has held that Congress did not abrogate the states' sovereign immunity in enacting 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332, 339-40 (1979). Because Washington has not consented to suit under §1983, private parties may not sue the State.

State officers, however, may be enjoined to conform their future behavior to federal law. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). "[I]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011) (second modification in original) (*quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)).

Here, Mr. Hoisington alleges ongoing constitutional violations in the form of unreasonable searches and punitive transportation policies and the Defendants' pleadings admit that the policies in question continue to be employed. ER 135 ¶¶ 5, 6.[21] The relief is properly characterized as prospective because Mr. Hoisington has requested for the unreasonable strip searches and punitive transportation policies to be permanently discontinued in the future.

Finally, neither state sovereign immunity nor the Eleventh Amendment bar declaratory relief. The Ninth Circuit has "long held that the Eleventh Amendment

[21] After the District Court proceedings, Plaintiff became aware that the DOC is no longer involved in the off-island transport of SCC residents. Such evidence is not in the record, however, and it does not mitigate Plaintiff's request for injunctive relief barring the punitive DOC policies from being employed during off-island transport.

does not generally bar declaratory judgment actions against state officers." *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 847 (9th Cir.), *opinion amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002). Again the only inquiry "is whether the declaratory action is seeking prospective, rather than retrospective, relief." *Id.*

B. On Remand, Mr. Hoisington Is Entitled to Pursue His Claim for Monetary Damages Because His Rights Were Clearly Established at the Time of the Violation.

The issue of qualified immunity was not decided because the district court found there was no constitutional violation. ER 22. If this Court reverses and on remand Mr. Hoisington establishes a constitutional violation, he will need to establish the violation of a clearly established right in order to be entitled to damages. *See Saucier v. Katz* 533 U.S. 194, 200-202 (2001).

D. 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, Mr. 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 Mr. Hoisington's clearly established right to a constitutionally adequate treatment environment.

Finally, because of the complexity and weightiness of his claims, Mr. Hoisington asks the Court to order that counsel be appointed upon remand.

DATED: May 4, 2012

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. 32(A)(7)(C) AND
CIRCUIT RULE 32-1 FOR CASE NUMBER 11-16471

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 Opening*** brief is

☒ Proportionately spaced, has a typeface of 14 points or more and contains 13,318 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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☐ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

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☐ 4. *Amicus Briefs*

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STATEMENT OF RELATED CASES

Counsel is aware of no cases pending before this Court that are related to this one.

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 Addendum to Plaintiff-Appellant's Replacement Opening 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 May 4, 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.

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