

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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Albert W. Florence,

**Plaintiff,**

**Case No. 05-3619(JHR)**

**-against-**

**Board of Chosen Freeholders of the County of  
Burlington, et al.,**

**Defendants.**

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***BRIEF SUPPORTING PLAINTIFF'S MOTION  
PURSUANT TO FED.R.CIV.P. 56 FOR SUMMARY JUDGMENT,  
PRELIMINARY INJUNCTION***

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## **I. INTRODUCTION**<sup>1</sup>

Plaintiff was one of a class of persons strip searched on a non-indictable offense without Defendants first articulating a reasonable basis that he or those similarly situated were hiding drugs, contraband or weapons. On March 20, 2008 this Court granted class certification based upon Plaintiff's 42 USC §1983 civil rights action seeking declaratory and injunctive relief for a class as defined by this Court as:

All arrestees charged with non-indictable offenses who were processed, housed or held over at Defendant Burlington County Jail and/or Defendant Essex County Correctional Facility from March 3, 2003 to the present date who were directed by Defendants' officers to strip naked before those officers, no matter if the officers term that procedure a "visual observation" or otherwise, without the officers first articulating a reasonable belief that those arrestees were concealing contraband, drugs or weapons."

Plaintiff testified at his deposition that he was strip searched at both Defendants' Burlington's and Essex' facilities. Defendants' deposition testimony confirmed that it is their custom and policy to direct all arrestees charged with non-indictable offenses during processing from March 3, 2003 to present to strip naked before an officer, and in the case of Defendant Essex, before many officers strip naked as a group, without first determining an individualized reasonable basis or suspicion that the search would lead to the discovery of contraband, drugs or weapons. This Court found in its March 20, 2008 Order (the "Order"), page 27 that "liability will seemingly boil down to whether the intake procedures, which require Defendants' officers to view the nude bodies of non-indictable arrestees, are tantamount to strip searches." The Order, at page 27, observed liability was indicated for both Defendants and that the Court was not convinced by Defendants' semantics, to wit:

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<sup>1</sup> Plaintiff's filed August 1, 2007 Certification Brief and made part of the record, cited as "Pl. Cert. Br.", of which every Exhibit thereto is incorporated as if fully set forth herein.

“...the record indicates that all arrestees at the Essex Jail are subjected to the same intake procedures without regard to the nature of their charged offense.<sup>10</sup> (See Pl. Exh. O, 13:23-14:11, 34:6-16; Pl. Exh. P, 9:21-10:1; Pl. Exh. Q, 22:11-20, 32:13-19.)”, and Footnote 10 “the Court notes that there is similarly testimony in the record indicating that all arrestees at the Burlington Jail— indictable or non-indictable— are subjected to the so-called “visual observation.” (See Pl. Exh. F, 17:14-19, 27:1-7; Pl. Exh. H, 54:4-12.)”

The question of law before this Court is whether the Defendants violate the federal civil rights of arrestees charged with non-indictable offenses by directing every arrestee to strip naked without first articulating a reasonable suspicion that they are hiding drugs, contraband or weapons. Plaintiff requests a preliminary injunction that Defendants’ cease and desist said policies as they violate constitutional rights, which is an irreparable harm demanding injunctive relief. Plaintiff requests counsel fees.

## **II. JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343, and 42 U.S.C. §1983

## **III. STATEMENT OF FACTS**

### **A. Plaintiff Florence’s Arrest & Strip Search**

On March 3, 2005, Plaintiff Florence was a passenger in his vehicle being driven by his wife on Interstate Highway 295 in Burlington County (Am.Compl., ¶¶13-14). A New Jersey State Trooper stopped the vehicle and arrested Florence based on an Essex County bench warrant issued April 25, 2003 (Pl.Cert. Br., p.1. The warrant charged a non-indictable offense related to a fine which Plaintiff had already paid. (*Id.*, p. 2.) Florence was taken by the State Trooper to the Burlington Jail (Am.Compl., ¶¶15,17). At Burlington Jail, Plaintiff was subjected to a strip search. FN2(*Id.*, ¶17). An officer directed him to remove all his clothing and, while naked, he was directed to open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals (Pl. Cert. Br-Exh. D,70:23-71:9). The officer sat about arm's length in front of Florence while he complied. (*Id.*, 213:16-18). Plaintiff was held at the Burlington Jail for six days then transported

by the Essex County Sheriff's Department to the Essex Jail. (Am.Compl., ¶¶17, 26). There Florence was processed and again subjected to a full strip and body cavity search (*Id.*). Essex Jail officers directed him and four other arrestees to enter separate shower stalls, strip off all their clothing, and shower. (Pl. Cert. Br-Exh D, 128:8-12.) Plaintiff and the other arrestees complied by stripping naked while two officers watched. (*Id.*, 215:22-216:11.) Plaintiff was directed to open his mouth, lift his genitals, turn around so that he faced away from the officers to squat and cough, and then to turn back around to face forward (*Id.*, 128:23-129:9; 129:9-15). Florence was then placed with the general jail population until the next day when the charges against him were dismissed. (Am.Compl., ¶ 29).

**i Arrestee Processing at Defendant Burlington<sup>2</sup>**

**b. Defendant Burlington County Jail's Warden & Officer Witnesses Confirm Their Custom & Policy of Processing New Arrestees Includes Stripping Them Naked in a Shower Area & Inspecting Their Genitals, Whether or Not They are Charged with a Traffic Offense, Non-Indictable Offense or an Indictable Crime, and They Testify that this Process that They Term a "Visual Observation" Is No Different Than a "Strip Search"**

**- Instructor Officer Haywood Reeder**

Officer Haywood Reeder is a corrections officer at Burlington County Jail since 1990, and in 1997 became an instructor to hundreds of officers and civilian employees there on jail policies and procedures, including strip searches (Pl. Cert. Br-Exh D 5:2-4,13-24; 6:19-20; 27:8-13, 22-24;9:5;31:19-22;). He conducted about 100 inmate strip searches during his employment (Pl. Cert. Br. Exh. F 7:19-25). Officer Reeder testified Plaintiff's charge was Civil Contempt, which prohibits a strip search because it is a non-indictable charge (*Id.*, 13-14:13-2). The March 3, 2005 Strip Search Authorization Form related to this incident, signed by Sergeant Chilton (Pl. Cert. Br.

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<sup>2</sup> Sections i-iii, pages are facts duplicated exactly from Plaintiff's Certification Brief filed August 1, 2008 to maintain fact and argument consistency for the Court and parties.

Exh. N), confirms Plaintiff was visually observed by an officer while Plaintiff was naked (Pl. Cert. Br. Exh. F 23:3-10). He defines a "visual observation" as checking for scars or marks on a naked arrestee in the shower room, whether in for an indictable or non-indictable charge, and being instructed by an officer to apply kwell while standing naked, then instructing the naked arrestee while exiting the shower naked to change to prison clothes (Pl. Cert. Br. Exh. F 14-15:20-24;16-18:10-22;19:2-4;21-22:24-2; 26:16-20;27:1-7). Officer Reeder defines a strip search as searching different parts of a naked inmate's body parts for contraband, scars, marks or tattoos, including lifting their genitals and turning around naked (Pl. Cert. Br. Exh. F 14:3-17;19:5-7; 28:16-22). Officer Reeder testified that if a court order informed that their visual observations are actually strip searches and must stop, he would follow that order and instruct his officers to stop visual observations (*Id.*, 37:1-11).

**- Officer Charles Palmer**

Officer Charles Palmer worked for Defendant Burlington since 2000, usually working the 7-3 and 11-7 shifts (Pl. Cert. Br. Exh. G 3:18-20;5:13-14). He defines non-indictable as a municipal charge like a traffic or contempt of court, both of which are subjected to visual observations (*Id.*, 5-6:24-7). He testified that all non indictables submit to a visual observation by being directed to strip naked, turn around so an officer can observe any marks or bruises and take a shower, where the officer remains while the arrestee is naked until he exits the shower because it would be improper procedure for an officer to leave the shower room (*Id.*, 6-7:8-20; 8:8-14;9-10:14-24;12-13:24-12;23-24:8-1). His "visual observations" of non-indictables have resulted in his finding piercings and tattoos on genitals (*Id.*, 13:13-20), meaning he inspects their genitals. He admits a visual inspection is looking at a naked person and that there is no difference between observing them naked and inspecting them naked (*Id.*, 21:7-15;24:2-7). The visual observations he described are conducted by all officers pursuant to jail custom and policy and

pursuant to the jail's direction (*Id.*,25-26:6-18;27:10-17). If he was directed by a court to stop stripping naked non-indictables then he would comply and stop (*Id.*,26:19-25).

**-Officer Sean M. Gallagher**

Officer Sean M. Gallagher worked at Burlington County Jail for 10 years since 1996 (Pl. Cert. Br. Exh. H 4:21-23;5:22-23). He confirmed that Plaintiff was admitted as a holdover on a non-indictable contempt of court offense, 2A:10-1C, which does not require a strip search but does requires a "visual observation" (*Id.*, 19-20:25-10;42-43:24-17;44:21-24). He confirmed that civil contempt charges can be a child support matter, and all civil contempts are stripped naked and visually observed when admitted (*Id.*, 43-44:21-7).

From 1997 to present, the intake search procedure includes every arrestee, no matter if they are indictable or non-indictable, being taken to a shower room to remove their clothes as the officer watches them until they are naked, takes each piece of clothing individually to check for contraband while the arrestee stands there naked, then directs the arrestee to turn around naked for the officer to visually observe the naked body front and back for scars, wounds, vermin or tattoos, where sometimes the officer will watch the arrestee shower naked while they apply a kwell shampoo and when they exit naked the officer gives them a change of clothes where they dress before the officer (*Id.*, 18-19:18-7;19:20-24;19-10:16-25;11:5-8,9-15;12:3-10,16-18; 13:4-24;14:11-22;38:6-11; 52:14-22; 54:4-25;27:3-7;32-33:10-5). During these "visual observations" he asks the arrestee to lift their genitals if he observes they have hanging genitalia; thus, they are standing naked (*Id.*,15-16:14-25).

He admits that an arrestee is standing stripped naked when they remove their clothes at an officer's direction and then the arrestee is being searched when the officer observes the naked body up and down and further has them lift their genitals (*Id.*, 21:9-23). Taking those two processes of stripping the arrestee naked and searching the body together creates a "strip search",

not a “visual observation” (*Id.*, 21:9-23). He admits NJSA 2A:161A3 properly defines a strip search to remove or rearrange clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breast and his visual observation definition is the same as a strip search (*Id.*, 22:5-25). He testified that if a court ordered officers to stop visually observing these non-indictable arrestees naked then he would comply (*Id.*, 48:1-7).

**-Lieutenant Jerry Coleman**

Lieutenant Jerry Coleman worked for Defendant Burlington County Jail since 1990, and a year ago became Chief of the Identification Department which is responsible for intake at the male and female facilities (Pl. Cert. Br. Exh. I 4-5:21-14;10:9,14). Plaintiff's charge upon admission of 2A:10-1C was a civil contempt, which is not a crime nor an indictable offense, and he believed it related to a missed court date or a child support matter (*Id.*, 6-7:20-4;8:15-20). He testified that because Plaintiff was a civil contempt then he was “visually observed” by an officer who directed him to strip naked and turn around so he could check him front and back (*Id.*, 11-12:12-13). The visual observation process for all non-indictables starts by being brought to the shower room where the Officer directs the arrestee to remove all of his clothes and while standing naked is instructed how to apply Kwell and directed to turn around naked for the Officer to check him front and back (*Id.*, 22:12-19;23:11-13,17-21;24:4-21;30:15-18).

**-Lieutenant Douglas Chilton**

Lieutenant Douglas Chilton started with Defendant Burlington in August, 1997 (Pl. Cert. Br.Exh. J 3:15-19). He testified that he executed Plaintiff's Strip Search Authorization Form as "not strip searched" (Pl. Cert. Br. Exh. N) because Plaintiff was admitted for a failure to appear, which is a non-indictable offense mandating a "visual observation" (Pl. Cert. Br.Exh. J 24-25:15-2). He testified that it is Defendant Burlington's custom to insure that all non-indictables get "visually observed" in a shower area for injuries, scars, marks or tattoos

(*Id.*, 12:1-3;16:10-15,21-23; 20:22-25;25:3-7;27-28:25-3;)

**-Warden Juel Cole**

Warden Juel Cole worked at Defendant Burlington County Jail since 1976 and became warden in 1997, with duties including overseeing operations of the correctional facility (Pl. Cert. Br.Exh. K 5-6:1-18;8:3-8). He confirmed Plaintiff was admitted as a holdover on a non-indictable civil contempt that does not mandate a strip search (*Id.*, 14:18-20;16:6-18; 18:10-13;64:17-23;64:7-9). He confirmed that the Strip Search Authorization Form for Plaintiff (Pl. Cert. Br. Exh. N) states there was no reasonable suspicion for him to be strip searched, and that he was “visually observed”, meaning the booking officer entered the shower area with the arrestee and directs the arrestee, whether indictable or non-indictable, to strip naked to check his torso and arms for marks, tattoos, either in the shower or while he's changing naked. (Pl. Cert. Br.Exh. K 24-25:18-3;25-26:7-2;46-47:11-3;50:10-13;52:3-17). The Warden testifies that if he directed a person to take off all of their clothes then he is directing that person to strip, but by his jail’s definition he does not consider observing a person naked as a “search” (*Id.*, 31:7-17).

**C. State of New Jersey Statutory Definitions of “Strip Search”,  
New Jersey Attorney General Guidelines & Defendants’ Own  
Internal Policies Confirm That Defendant Burlington’s Intake  
Shower Processing is a Strip Search & Body Cavity Search  
Unlawfully Conducted Upon All Arrestees Charged With  
Non-Indictable Offenses Without Ever First Articulating a  
Reasonable Basis to Strip Them**

In response to Plaintiff’s discovery requesting strip search policies of Defendant Burlington, they produced (a) their Policy and Procedure Section 1186, “Search of Inmates” (“1186”) (Pl. Cert. Br.Exh. L ) and (b) New Jersey Corrections Statute 10A:31-8.4 (Pl. Cert. Br.Exh. M). Defendant Burlington’s officer and warden witnesses testified that 1186 is the policy they follow with respect to strip searching at the jail (Pl. Cert. Br.Exh. H 28-29:25; 30:4-16; 35:7-25;Pl. Cert. Br.Exh. K 60:12-22; Pl. Cert. Br. Exh. J 10:8-20). Defendant Burlington also

produced the March 5, 2005 Strip Search Authorization Form signed by Sergeant Chilton listing Plaintiff as "visually observed" (Pl. Cert. Br.Exh. N).

Page 1 of 1186 states that "NJAC 10A:31-8.1 thru 8.9" must be followed as well. New Jersey Corrections Statute 10A:31-8.4 mandates that a person arrested or detained for an offense other than a crime shall not be strip searched unless there is reasonable suspicion that person is carrying a weapon, drugs or other contraband. If a strip search proceeds then it must be in private, where no unauthorized person can observe the strip search and a written report must be filed stating, among other things, the reason for the search and identifying the officers who conducted the search. Corrections Statute 10A:31-8.6 mandates that a body cavity search of a person arrested or detained for an offense other than a crime shall not occur unless the staff person in charge determines that there is reasonable suspicion that a weapons, controlled substance or contraband will be found. A body cavity search must be done by a physician or registered nurse and not where unauthorized persons can observe it. A written report must be filed by the custody staff member in charge and state the facts indicating the reasonable suspicion and identify the person(s) conducting the search, among other things.

Page 1 of 1186 defines a "Body or Strip Search" as a physical search of an "unclothed" inmate which consists of a visual observation to discover scars, marks "and/or the concealment of contraband on the inmate's body." This definition conforms with Defendants' witness' testimony above that a "visual observation" they conduct on non-indictables and a "strip search" are the same process. The disconnect from the officers' and warden's custom and policy is at page 2 of 1186 mandating that a person admitted on a non-indictable offense shall not be strip searched. The confusion continues at page 3 thereof defining a "strip search" as checking for body vermin, cuts, tattoos, and other injuries. Exactly as Defendant Burlington's witnesses testified, there is no difference between a "strip search" and a "visual observation" pursuant to their policies. In fact,

1186 provides no guidance as to what a "visual observation" is, other than it being the same procedure as a "strip search".

ii. Arrestee Processing at Defendant Essex County Correctional Facility

**b. Defendant Essex County Correctional Facility's Officer Witnesses Confirm that Processing of New Arrestees Includes Stripping Them Naked In a Shower Area Before Officers and Other Arrestees, Whether Or Not They Are Charged with a Traffic Offense, Non-Indictable Offense or an Indictable Crime**

**- Sergeant Thomas Logue**

Sergeant Thomas Logue works the intake since 2005, and was working March 9, 2005, the night Plaintiff was booked (Pl. Cert. Br.Exh. O 5:11-18; 10:10-14). He testified that during intake processing the arrestees are never segregated according to their charges, whether indictable or non-indictable or traffic or murder, and he confirmed that "Everybody is treated the same" at processing, whether they are there for a traffic offense under Title 39, which is not a crime, or for murder (*Id.*,13-14:23-11;16-17:21-1;34:6-16). He testified that during processing Defendants' officers call three arrestees at a time to enter the shower area (*Id.*,:21-23; 20:1;21:14-18). There could be two officers waiting in the shower area where the officer directs the arrestees to remove all their clothes and place them in gray bins (*Id.*,19:2-7;22:2-9; 22-23:22-1;23:7-10). Arrestees undress simultaneously because the officer wants to insure everything goes in the gray bin (*Id.*,23:4-5; 25:21-25). The arrestees stand naked about two to three feet from each other (*Id.*,23:2-4; 24:6-11). They can look to the left or right of each other and see the next inmate standing there naked, while the officer is about 5 feet from them to view them naked (*Id.*,24:12-16,22-24). The procedure is that the officer should keep his eyes on the naked inmates (*Id.*,33-34:22-5).

**- Intake Officer Richard Monroig**

Richard Monroig is a corrections officer with Defendant Essex since 1995 who works

intake (Pl. Cert. Br.Exh. P 5:8-13;7:19-24;7-8:24-2). He testified that arrestees are never separated as indictable or non-indictable charges when they enter the pre book processing at Defendant Essex (*id.*, 9-10:22-1). Processing officers are never trained as to what charge is indictable or non-indictable (*Id.*,37:22-25). He has seen contempt of court and traffic court arrestees come through intake, and they all get processed the same way (*Id.*, 38:19-25).

He described the shower process as three inmates at a time are led to the shower area where an officer waits in there and they are directed to remove all of their clothes and shower (*Id.*,12:12-15;13:12-15,21-24;13-14:25-2;14:22;15:10-15). All three of them could be naked at the same time and when they undress there is an officer watching them naked (*Id.*,16:3-5;21:6-18). All three arrestees are directed to remove their clothes, place them in a gray bin in front of them and stand there naked, (*Id.*,16:6-14; 17:7-15). There are 3 shower stalls open from the front, with a wall between each but no curtains so they can be observed since, and they exit from the shower still naked to dress in jail clothes (*Id.*,13:14-18;14:5-10;19:14-23). Officer Monroig has been in the shower room and directed arrestees to remove their clothes during his career, observing three men standing there naked at the same time (*Id.*, 17:16-25).

**- Lieutenant Michael Salzano**

Michael Salzano started as an officer at Defendant Essex in 1987 and became lieutenant in 2004 (Pl. Cert. Br.Exh. Q 4:15-21). He is in the shower room daily as part of his rounds (*Id.*,13:2-7). He is very familiar with intake procedures, that include prisoners stripping when they arrive, and being directed to shower and exit the shower to dress in their jail clothes (*Id.*,6:13-16, 21-23;12:9-23). He described the shower area as "...small and tight", with five shower stalls on one side of the wall (*Id.*,14:17-18;15:2-6,15:11-17). There is one officer per arrestee standing about 4-5 feet in front of the shower to search their clothes, shoes, and jacket (*Id.*,16:4-15;17:8-16). There can be 3 arrestees in the shower area at the same time, and that the

old jail in 2003 used same shower procedure as new jail (*Id.*,18:1-5;19:23-25). The procedure has always been that Defendant Essex' officers direct arrestees to remove their clothes then take a shower (*Id.*,20:19-25). He testified that even detainees on motor vehicle Title 39 charges are processed exactly like everyone else, where they enter a shower area with up to three persons at a time (*Id.*,21:11-20), and, no matter what their charge or offense is, all detainees go through the exact shower process because "Everybody gets treated exactly the same." (*Id.*,21:14;21-22:21-9,17-20). Intake does not separate indictable from non-indictable offenses (*Id.*,32:13-19).

**- Warden Larry Glover**

Warden Larry Glover was the warden at Defendant Essex County Correctional Facility since July, 2004 (Pl. Cert. Br.Exh. R 10:13-15). He testified that arrestees are thoroughly searched by removing their clothes in the shower area where an officer searches those clothes, and there can be three arrestees in the shower area at a time (*Id.*,24:16-21;25:5-6). Before they enter the open shower stall, they stand in front of it and after they strip off all of their clothes they put them in a gray bin in front of an officer; conceivably up to six officers can be present during the strip process (*Id.*, 25-26:12-15).

**c. Defendant Essex' Officer Witness Testimony Confirms Their Intake Shower Processing is a Strip Search, Defining a Strip Search as Stripping Someone Naked**

Sergeant Logue confirmed that when a person removes all of their clothes they are naked and a person is stripped when they are naked and directed to remove all their clothes is a strip (Pl. Cert. Br. Exh O 30:18-20;31-2-4; 32:10-13). Intake Officer Richard Monroig defined a search as a pat down and a strip search as a squat and cough and checking the person's hands, hair, mouth and body (Pl. Cert. Br.Exh P 23:5-8;25:8-12). Lieutenant Salzano defines a squat and cough is part of a body cavity search (Pl. Cert. Br.Exh. Q 34:11-13). Warden Glover defines strip search as

being observed while removing all clothing, inspection of the naked body of an individual for the purpose of discovering contraband, and then bending over and spreading their cheeks, but not a squat and cough (Pl. Cert. Br. Exh. R 11:2-8;33:1-16).

**d. Defendant Essex' Intake Shower Processing is a Strip Search Unlawfully Conducted Upon All Arrestees Charged With Non-Indictable Offenses Without Ever First Articulating a Reasonable Basis to Strip Them**

Defendant Essex' internal policies entitled "Department of Public Safety General Order" number 89-17, 9/27/02 and Directive 04-06 were submitted as part of their discovery response to Plaintiff. Defendant Essex' Warden and Officer witnesses confirmed that the law governing their strip and body cavity procedures is Corrections Code 10A (Pl. Cert. Br.Exh O 35-36:21-3;Pl. Cert. Br.Exh. P 6:17-25;Pl. Cert. Br.Exh. R 44:17-21;); however; 10A follows 2A:161A-2 which defines Defendant Essex' processing as nothing but a strip search, and conducted in violation state and federal laws. Criminal Justice Code 2A:161A-1(a)(c) mandates that a person detained in facility for a commission of an offense other than a crime shall not be strip searched unless reasonable suspicion exists that a weapon, controlled dangerous substances or contraband will be found and the search is authorized. Strip searches demand the same suspicion as mandated in 2A:161A-2. This Code at 2A:161A-3 defines strip searches as the "removal or rearrangement of clothing" for purposes of a "visual inspection" of the person's undergarments, buttocks, anus, genitals or breasts and a body cavity search is the visual inspection or manual search of a person's anal or vaginal area.

Defendant Essex' internal policies entitled "Department of Public Safety General Order" number 89-17, 9/27/02 ("89-17") defines Defendant Essex' arrestee intake procedure effective in 2002. This 89-17 policy violates New Jersey's Corrections Statute 10A:31-8.4 prohibiting strip searching without reasonable suspicion and accomplished only in private with a report of the strip

search filed. Defendant Essex' 89-17 at page 3, Sections A2-4 mandates that at processing every arrestee "shall be strip searched" and after the strip search take a shower. Page 4, section B continues that the "Reception Officer will have the inmate undress completely" and "must observe carefully while the inmate undresses", directing the inmate to open his/her mouth, examine the ears, nose and "4. Inspect all body openings...". Page 5 describes that certain written reports must be filed when a body cavity search is conducted. At page 12, Order 89-17 concludes with mandates that every jail personnel shall comply with the Order and Command and Supervisory Officers shall ensure their subordinates carry out the mandates of the Order. Order 89-17 in itself violates the law by mandating every one at reception to be strip searched then showered, an unlawful policy consistent with the testimony of every Defendant Essex witness describing all arrestees as being stripped naked at the shower area to this very day. Worse, Defendant Essex' personnel and supervisors add the more offensive custom and policy of stripping them as a group, whether or not they are a traffic offense, a contempt of court or a murder charge (indictable or non-indictable). Despite its clear violation of federal law, 89-17 at page 12 mandates supervisors enforce this unlawful strip search policy.

In April 21, 2005 directive 89-17's offensive mandatory strip search policy was revised by Directive 04-06. Notably, the revision by words on paper is a vague attempt to conceal the official policy and custom of mandatory strip searching that continues to this day. For instance, Directive 04-06, page 4, section c(5) mandates the Booking Area Security Officer to "conduct a thorough search of individual inmates", and after that it lists having the arrestee shower and having the officer observe the naked arrestee for any marks or injuries. Despite this change in words, Defendant Essex' witness Warden Glover testified that the "thorough search" provision means up to three arrestees enter the shower area together and after they remove all of their clothing an officer checks their clothing then the arrestee is permitted to take a shower (Pl. Cert.

Br.Exh. R 24-25:12-9). Every witness testified to the same group strip procedure as detailed herein above. Despite a 2005 policy revision eliminating the words “strip search” contained in 11-86, Defendant Essex’ witnesses testified that the procedure to date has always been that all arrestees, whether admitted on indictable or non-indictable charges, are stripped naked in groups before officers who observe their naked bodies. Policy 04-06 at page 11 mandates that all supervisors ensure officers comply with the “thorough search” procedure, which according to testimony is to strip every one naked, no matter what their charge is. In sum, during the class period of this action, from March 3, 2003 to date, Defendant Essex’ policy is to strip non-indictable arrestees in a group and before other officers to be observed naked without articulating a reasonable basis to do so.

#### **IV. SUMMARY JUDGMENT LEGAL STANDARD**

Summary judgment is appropriate when the Court is satisfied that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986); Fed.R.Civ.P. 56. The “[S]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” *Holt Cargo Sys., Inc. v. Delaware River Port Auth.*, 20 F. Supp. 2d 803, 818 (E.D. Pa. 1998) (granting defendants’ motion for summary judgment), *aff’d*, 165 F.3d 242 (3d Cir. 1999). A “genuine” issue is one supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A “material” fact is one that, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* The moving party has the initial burden of demonstrating the absence of a genuine issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Upon the moving party meeting this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.*

The nonmoving party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir.2001). The nonmoving party must identify specific facts and affirmative evidence contradicting those offered by the moving party. *Anderson*, 477 U.S. at 256-57. If opposition to summary judgment reveals no genuine issue of material fact, then judgment may be entered in favor of the party deserving of judgment in light of the law and undisputed facts. *Iberia Foods Corp. v. Romeo Jr.*, 150 F.3d 298, 302 (3d Cir.1998).

In the present case, it is undisputed by Defendants' witness' admissions in depositions that they maintain a policy from March, 2003 to date of directing every arrestee, including non-indictables, who enters their jails to strip naked before officers who observe their naked bodies, without first articulating a reasonable suspicion of their concealing drugs, weapons or contraband. The attached Statement of Undisputed Facts is taken directly from those facts related by this Court's March 20, 2008 Order after its careful review of the record, briefs and opposition Briefs for certification. That Statement of Undisputed Facts makes crystal clear that Defendants' implement a custom and policy of blanket strip seraches-no matter what their charge is, indictable or non-indictable, everyone gets treated the same. It is crystal clear by the law developed by the United States Supreme Court, District and Circuit Courts nationwide and in this Circuit that viewing the naked body of an arrestee for a non-indictable charge without first articulating a reasonable basis is a strip serach violating the public's Constitutional rights under the Fourth and Fourteenth Amendments. No play on words by Defendants can deny the fact that being ordered to take off all of your clothes is a "strip" and being viewed in a jail setting after being ordered to strip

naked is a “search”. This Court’s March 20, 2008 Order rejected Defendants’ semantics “visual observations” or “change overs” are not strip searches. The undisputed facts establish that Defendants’ policy of strip-searching all arrestees without individualized suspicion is a violation of clearly established constitutional law. Summary Judgment and an injunction against Defendants’ is appropriate.

## **V. ARGUMENT**

### **A. The Third Circuit & this District Court Hold it Unlawful to Strip Search Persons Charged with Non-Indictable Offenses Without Articulating A Reasonable Basis for the Strip Search**

The Fourth Amendment proscribes “unreasonable” searches. Under *Bell v. Wolfish*, 441 U.S. 520 (1979) the judgment of whether a search of jail detainees who have not been convicted of any offense is reasonable under the Fourth Amendment requires the court to weigh “ the need for the *particular* search against the invasion of personal rights that the search entails.” (*Id.* at 559 [emphasis added]). In the case at bar, Defendants witnesses admit they customarily have every arrestee entering their facilities to strip naked and are observed by their Officers, without first articulating a reasonable basis to do so. Thus, they admit that every unnamed class member, being every arrestee charged with a non-indictable offense listed on Defendants’ disks provided during discovery has been ordered to remove all fo their clothes and stand naked before Defendants’ officers without Defendants first articulating a reasonable basis to do so.

Since *Bell*, this District court has multiple times invalidated strip searches of non-indictable arrestees when no articulation of reasonable suspicion of the arrestee hiding contraband, drugs or weapons is made. This District held that a driver’s Fourth Amendment rights were violated when he was subjected to a strip search at a jail when arrested for a non-indictable Title 39 traffic offense. *Ernst v. Borough of Fort Lee*, 739 F.Supp. 220 (DNJ,1990). In *Ernst* the

court refused to accept the defendant jail's attempt to claim their blanket strip search policies conformed with then state law, holding the issue was not whether they were following state law but whether they were violating federal constitutional law prohibiting unreasonable searches, being strip searches without a basis. In *O'Brien v. Borough of Woodbury Heights*, 679 F.Supp. 429 (D.N.J.1988) this Court held that a jail's blanket strip search policy of non-indictable arrestees was unconstitutional when suspicion of the arrestee harboring contraband did not exist. Notably, *O'Brien* found that the law prohibiting blanket strip/body cavity searches of inmates was clearly established since December 1985. In *Roderique v Kovac* 1987 WL 17058 (DNJ) a woman was arrested for unpaid parking tickets and directed to remove her clothes, raise her hands above her head, spread her legs and bend over. Just as in the case at bar, there was no physical contact during the *Roderique* strip search, and it was conducted in accordance with then state laws N.J.A.C. 10A:313.12, requiring all newly admitted inmates to a county correctional facility be strip searched for weapons and contraband. This Circuit in *Roderique* concurred with *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) holding strip/body cavity searches of persons charged with misdemeanors or other minor offenses are improper under the Fourth Amendment unless there is a reasonable suspicion that the arrestee is concealing weapons or contraband on the crime charged.

Notably, Defendant Essex employed a written policy of blanket strip searches pursuant to its Order No. 89-17, effective September 2002. That Order provides that, upon arrival at the Essex Jail, all arrestees shall be strip searched and then required to shower. (See Pl. Cert Brief, Calabro Cert., 8/2/07, Exh. D(1), p. 3, § V.A.2. & 3.). It further states that a strip search is to consist of having an arrestee undress completely while Officers "observe carefully" while they undress. (*Id.*, p. 4, § V.B.). That Order was effective until 2005 when it was succeeded by Directive No. 04-06. Although Directive No. 04-06 appears to facially prohibit strip searches without a reasonable basis, it still directs Officers to thoroughly search all arrestees and note any

body markings or tattoos when they shower. Thus, Defendant Essex' written policies along with their witness testimony admit blanket strip searches are conducted. In the least, this Court can declare their unconstitutional policy during this class period of March, 2003 through September, 2005 by their written policy pursuant to their Order No. 89-17. Nevertheless, the policy does not have to be written as it can be a custom established, see *Weber*, 804 F.2d at 803 (where sheriff ordered strip searches, he established county jail policy). *Roderique* held that a blanket policy of strip/body cavity searches of all arrestees regardless of the nature of the charges is unconstitutional. The sanctity of an arrestee's constitutional rights of not being indiscriminately "visually observed" naked in any way is defined in *DiLoretto v. Borough of Oaklyn*, 744 F.Supp. 610 (DNJ,1990), wherein this court held that an officer conducted an unlawful search and violated a person's "reasonable expectation of privacy" when she visually observed an arrestee urinate. at 620. Thus, as Defendants' witnesses admit through testimony they have a custom and policy of blanket strip searches at their jails, their "written" policies are negated by their de facto conduct.

New Jersey's strip search jurisprudence is found in the holding of *Davis v. City of Camden*, 657 F. Supp. 396, 399 (D.N.J. 1987), wherein the constitutionality of a strip search bears on the existence of reasonable suspicion whether the arrestee is concealing drugs or contraband. There the plaintiff was charged with a non-indictable offense and directed to remove all of her clothes before an officer who never made physical contact with the plaintiff (a search similarly conducted by the Defendants in the case at bar). The *Davis* court found persuasive the holdings of eight Circuit Courts of Appeals that 'there must be a 'reasonable suspicion' that an arrestee is concealing weapons in order for a strip search to be constitutionally justified. *Id.* at 399. In contravention to the long-standing holding of *Davis*' 1987 decision, both Defendants' admit that during the class period from 2003 through date they never articulate a reasonable suspicion before directing arrestees to strip naked before their officers. Defendants admit everyone is treated the

same during the class period, no matter if they are non-indictable or indictable charges. They all are stripped naked. Defendants can not deny *Davis* and its progeny clearly established their conduct as unconstitutional in this State since 1987, some 22 years ago and 13 years prior to the 2003 start date. Defendants instead refuse to rectify the problem and ignore this Court's attempts to mitigate the problem. Defendant's prefer instead to continue to engage in the very violations that the Fourth Amendment prohibits, exactly the kinds of searches of which Plaintiff and the class complain.

Other Districts hold the removal of an arrestees' clothes is a strip search. In *Adnan v. Santa Clara County Dept. of Corrections*, 2002 WL 32058464 (N.D. CA 2002) the court found "even if the searches are visual rather than physical, the degree of intrusion is significant and does not appear to be justified by a legitimate penological interest." In *Mason v. Village of Babylon, New York*, 124 F.Supp.2d 807, 816 (E.D. NY 2000) the District Court held the Fourth Amendment was violated where plaintiff was arrested for a traffic violation required "to lift her shirt, lower her pants and, as put by the County, rearrange her undergarments." In *Wood v. Hancock County Sheriff Department*, 354 F.3d 57 (1st Cir. 2003), the plaintiff was required to exchange his clothes for jail gear, to strip in the presence of a correctional officer and then shower – exposing himself to the officer for several seconds. The First Circuit held the trial judge had defined "strip search" too narrowly, by requiring the jury to find a deliberate inspection of various body parts. That definition, said the First Circuit, "undervalued" the "impact of the forced nudity." (354 F.3d at 63-64.) The court explained that "(w)hether or not the officers set out deliberately to inspect a prisoner' naked body is not the question; it is, rather, whether the officers did, in fact, perform such a search." (354 F.3d at 63-64).

**B. Summary Judgment that Strip Searches Are Unconstitutional is Appropriate Against a Jail Facility Conducting Blanket Strip Searches of Arrestees Without First Articulating a Reasonable Suspicion**

Summary judgment has been granted in other Districts in the same circumstance as this case. In *Marriott v. County of Montgomery*, 426 F.Supp. 2d 1 (NDNY 2006) the District Court granted summary judgment that strip searches were unconstitutional, a permanent injunction and interim award of attorneys' fees. The District Court in *Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir. 1989) invalidated a policy requiring visual body cavity searches of all felony arrestees regardless of reasonable suspicion. The District Court in *Savard v. Rhode Island*, 338 F.3d 23, 26 (1st Cir. 2003) held a policy of strip searching persons arrested for nonviolent, non drug related misdemeanors, in the absence of particularized suspicion, violated the Constitution, even where the arrestees will be intermingled with the general population in a maximum security prison.

In the case at bar, the Defendants' witnesses admit outright that everyone gets strip searched, and the officers do not segregate arrestees' by their charges of indictable or non-indictable. They attempt to conceal their strip search violations by semantics. Defendant Burlington created the phrase "visual observation". Defendant Essex argued throughout this case it was a "changeover" or the officers happened to look but not for very long. That argument fails as Defendant Essex admits in their Opposition Briefs to class certification and their recent Motion for Reconsideration that all arrestees are stripped naked at the shower area without regard to their charge nor before articulating a reasonable suspicion of their concealing drugs, weapons or contraband. Defendant Essex considers it routine processing to treat every one the same, so they do not even file a strip search report at processing because they do not consider it a strip search. Defendant Burlington, on the other hand, will file a strip search report falsely marking off that the arrestee was "Not Strip Searched", because they do not consider their "visual observation" it a strip search. However, the law is concerned only with the fact that they are stripped naked without a reasonable basis

articulated first. This Court confirmed Defendants' admissions that everyone is stripped regardless of their charges and without an articulable basis to do so in its March 20, 2008 Order certifying the class that

“...the record indicates that all arrestees at the Essex Jail are subjected to the same intake procedures without regard to the nature of their charged offense.<sup>10</sup> (See Pl. Exh. O, 13:23-14:11, 34:6-16; Pl. Exh. P, 9:21-10:1; Pl. Exh. Q, 22:11-20, 32:13-19.)” and Footnote 10 “the Court notes that there is similarly testimony in the record indicating that all arrestees at the Burlington Jail— indictable or non-indictable— subjected to the so-called “visual observation.” (See Pl. Exh. F, 17:14-19, 27:1-7; Pl. Exh. H, 54:4-12.)”

This Court rejected Defendants' semantics.

The fact is that N.J.S.A. 2A:161A3 defines a strip search as “the removal or rearrangement of clothing for the purpose of visual inspection of the person's undergarments, buttocks, anus, genitals or breasts.” Plaintiff's testimony confirms he was strip searched consistent with Defendants' witness' testimony. Ultimately, each witness concedes that there is no difference between what they call a “visual observation” and a “strip search”. Case law holds jails liable for strip searching although they term it a “visual observation” *Marriot v. County of Montgomery*, 227 F.R.D. 159 (NDNY, 2005)*aff*, 2005 WL 3117194 (2d Cir. 2005) (class certification granted pursuant to §1983 claims of unconstitutional strip searching based upon jails “visual inspection” of arrestees naked bodies who were charged with misdemeanors and minor offenses); *Wood v. Hancock County Sheriff Dep'* 354 F.3d 57, 63 (1st Cir. 2003) (“ strip searches often may involve additional steps, we decline to draw the line so narrowly that standing naked for inspection by officers falls short of being a strip search if unaccompanied by a demand to open one' mouth or lift one' arms). Unquestionably, the serious intrusion stems from exposing one's naked body to office scrutiny; the impact of that forced nudity is undervalued if focused attention of the mouth and underarm is also required to reach the threshold of a strip search” *Sec. and Law Enforcement Employees, Dist. Council 82 v. Care*, 737 F.2d 187 (2d Cir. 1984); *Shoemaker v. Handel*, 606 F.

Supp. 1151, 1157 (D.N.J. 1985); *Owens v. County of Del.*, 1996 WL 476616 (E.D. Pa. Aug. 15, 1996). It does not matter if some were directed to stand naked while another stood naked and was directed to manipulate their genitals as other District Courts established. *Blihovde v. St. Croix County, Wisconsin*, 219 F.R.D. 607 (W.D. Wis. 2003); *Nilsen v. York County*, 219 F.R.D. 19, 22 (D. Maine 2003), *aff'd sub nom, Tardiff v. Knox County*, 365 F.3d 1 (2004).

**C. Defendants' Polices of Strip Searching Every Non-Indictable Arrestee Without First Articulating a Reasonable Basis Violates their Constitutional Rights, Which is An Irreparable Harm Mandating Injunctive Relief**

Plaintiff's Amended Complaint complains of a class of arrestees' constitutional rights being violated from March, 2003 to date, and requests injunctive relief on behalf of that class (Pl. Am. Compl. ¶¶41, 44). This Court's March 20, 2008 Order certified a class "from March 3, 2003 to the present date". Accordingly, Plaintiffs, as a certified class, have standing to seek prospective injunctive relief. Defendant's violations are not incidental. Here, a preliminary injunction is needed as the record establishes Defendants' continue to unlawfully strip search non-indictable arrestees this very day. Defendants' refuse to voluntarily cease this unlawful practice, and updated lists of non-indicatable arrestees from each Defendants' facilities show astounding numbers of some \_\_\_ Essex and \_\_\_ Burlington violations since 2003 to date (Lask Cert, June 27, 2008). Plaintiff and the class deserve a prospective preliminary injunction.

A preliminary injunction is appropriate when the party seeking such relief shows (1) a reasonable probability of success on the merits, (2) that it will be irreparably harmed if the injunction is not granted, (3) that the non-moving party will not suffer greater harm if the injunction is granted, and (4) that the public interest at stake favors the granting of an injunction. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir.2004).

Plaintiff's probability of success in proving Defendants' blanket strip search is unconstitutional is more than reasonable. There is a strong probability that the strip searches at issue here, conducted as a matter of course without reasonable suspicion, will be found violative of the Fourth Amendment under *Weber*, *supra*. and its progeny. Undoubtedly Plaintiff will succeed because Defendants' witnesses all admit that they strip search every non-indictable arrestee without first articulating a reasonable suspicion the arrestee is concealing contraband,

weapons or drugs. The law has been clear for over 22 years since *Davis*, supra. that blanket strip searches are unconstitutional.

Irreparable harm is proven if the party requesting the injunction can “demonstrate [ ] a significant risk that [it] will experience harm that cannot adequately be compensated after the fact by monetary damages.” *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir.2000). Here, no money damage can compensate for the humiliation and degradation of an individual arrested for a traffic violation or failure to pay child support ordered to strip naked before officers in a prison setting. As the law is clear that strip searches are constitutional violations then subjecting the citizens to such violations is a penalization of their constitutional rights by those in authority-officers in a prison setting. This Circuit holds irreparable injury occurs when there is a direct penalization of a person’s First Amendment rights. *Hohe v. Casey*, 868 F.2d 69 (3rd Cir,1989). Likewise then, Plaintiff contends irreparable injury occurs when a person’s Fourth Amendment rights are penalized.

Cases since *Hohe*, hold preliminary injunctions will issue when a person’s First Amendment constitutional rights are infringed. (*Voicenet Communications, Inc. v. Pappert*, 126 Fed.Appx. 55, 56(3rd Cir.,2005);*Lysaght v. State of N.J.*,837 F.Supp. 646D.N.J.,1993;*Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Tp. School Dist.*, 233 F.Supp.2d 647D.N.J.,2002). As *Howe* and its progeny, Plaintiff and the class in the case at bar suffer a direct impact upon their Fourth and Fourteenth Constitutional rights by Defendants’ blanket strip search policy. Plaintiff and the class, including all those persons this very minute entering Defendants’ jail facilities, suffer irreparable harm. A preliminary injunction must be granted.

The public interest will benefit from this injunction. Neither the Defendants as state actors nor the public itself can claim an interest in enforcing an unconstitutional law. *ACLU v. Reno*, 217 F.3d 162, 172 (3d Cir.2000). Moreover, there is no hardship to Defendants if a preliminary injunction is ordered. Defendants’ can forthwith employ measures of segregating indictables from non-indictables upon entrance to their jail facilities, just as Plaintiff’s counsel suggested they voluntarily do to avoid this motion practice (Lask Cert, 6/27/08). Thus, when non-indictables arrive, Defendants’ intake officers will make note of their charges as indictable or non-indictable, segregate the non-indictables from the indicatbales then insure that before any arresstee is strip serached that a articuable reasonable suspicion exists that an arresstee is concealing drugs, contraband or weapons.

## V. CONCLUSION

For the forgoing reasons, Plaintiff requests this Honorable Court to grant summary judgment declaring unconstitutional Defendants' custom and policy of strip searching all non-indictable arrestees and a preliminary injunction against Defendants' continuing their strip searches..

/s Michael V. Calabro

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Newark, NJ

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