

**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; Burlington County Jail; Warden Juel  
Cole, Individually and officially as Warden of Burlington  
County Jail; Essex County Correctional Facility, Essex  
County Sheriff's Department; State Trooper John Doe  
Individually and in his Capacity as a State Trooper, &  
John Does 1-3 of Burlington County Jail & Essex County  
Correctional Facility who performed the strip searches,  
& John Does 4-5,**

**Defendants.**

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***BRIEF SUPPORTING PLAINTIFF'S MOTION  
PURSUANT TO FED.R.CIV.P. 23 FOR CLASS CERTIFICATION***

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**TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1
II. FACTS.....	1
A. Plaintiff Was Arrested Upon an Invalid & Erroneous Warrant Charging Him With a Non-Indictable Offense of Hindering Prosecution 2C:29-3....	1
i. Arrestee Processing at Defendant Burlington County Jail.....	3
a. Plaintiff’s Testimony of His Processing at Burlington County Jail Confirms He Was Stripped Naked & Body Cavity Searched In a Prison Shower Area by an Officer Who Directed Him to Strip Naked, Turn Around & Manipulate His Genitals, Without A Articulation of Reasonable Suspicion that Plaintiff, As a Holdover on a Non-indictable Offense of Contempt, Was Concealing Drugs, Contraband or Weapons to Warrant a Strip and Body Cavity Search.....	3
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” .....	3
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.....	10
ii. Arrestee Processing at Defendant Essex County Correctional Facility.....	11
a. Plaintiff’s Testimony of His Processing at Defendant Essex Confirms He Was Stripped Naked & Body Cavity Searched In a Prison Shower Area With Officers & Other Arrestees & Persons Present Observing Plaintiff & Others Squat & Cough & Manipulate Their Genitals as a Group Stripped Naked, Without Articulating a Reasonable Basis that Plaintiff Was Concealing Drugs, Contraband or Weapons to Warrant a Strip and Body Cavity Search.....	12

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.....	13
c. Defendant Essex’ Officer Witness Testimony Confirms Their Intake Shower Processing is a Strip Search & Body Cavity Search, Defining a Strip Search as Stripping Someone Naked & a Body Cavity Search as Including a Squat & Cough.....	16
d. State of New Jersey Statutory Definitions of “Strip Search”, New Jersey Attorney General Guidelines & Defendants’ Own Internal Policies Confirm That Defendant Essex’ 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.....	17
III. ARGUMENT .....	21
A. A Motion for Class Certification is Given Liberal Construction, Limited to R. 23 Elements, & the Merits of the Case Have No Impact Because Plaintiff’s Allegations are Deemed True.....	21
i. 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.....	23
ii. Circuit Courts Nationwide Certify §1983 Class Actions Alleging Prison Strip Searches of Aresstees Charged with Non-Indictable Offenses.....	25
B. ELEMENTS OF CLASS CERTIFICATION PURSUANT TO R. 23....	27
i. Numerosity.....	27
ii. Commonality.....	28
iii. Typicality.....	30
iv. Adequacy.....	31
IV. PLAINTIFF’S COUNSELS’ PLAN TO MANAGE NOTICE & DAMAGES.....	35
A. Notice is Easily Manageable as Plaintiff’s Efforts During Discovery Resulted in an Organized List of Names & Contact Information of Putative Class Members.....	35
V. CONCLUSION.....	36

TABLE OF AUTHORITIESStatutes:

42 USC §1983.....	1,22,36
FRCP 23 .....	21-23,26,28,34
N.J.A.C. 10A:313.12.....	24
NJ Corrections Statute 10A:31-8.4.....	5,7,10,18
NJ 2C:29-3 .....	1,2
NJ 2A:10-1C.....	6
N.J.S.A. 2A:161A1-3 .....	3,5,6,7,11,18-19

Cases & Other Citations:

Attorney General’s Strip Search and Body Cavity Search Requirements and Procedures for Police Officer’s.....	17
<i>Baby Neal v. Casey</i> , 43 F.3d 48, 56 (3d Cir.1994).....	28,30
<i>Blihovde v. St. Croix County, Wis.</i> , 219 F.R.D. 607 (W.D. Wis. 2003).....	25,29
<i>Calvin v. Sheriff Of Will County</i> , 2004WL1125922 (N.D. Ill. May 17, 2004).....	26
<i>Crown, Cork &amp; Seal Co. v. Parker</i> , 462 U.S. 345 (1983).....	22
<i>Davis v. City of Camden</i> , 657 F. Supp. 396 (D.N.J. 1987).....	9,25
<i>DiLoretto v. Borough of Oaklyn</i> , 744 F.Supp. 610 (DNJ,1990).....	25
<i>Dodge v. County of Orange</i> , 209 F.R.D. 65 (SDNY 2002).....	26
<i>Dodge v. County of Orange</i> , 226 F.R.D. 117 (SDNY 2005).....	26
<i>Eddlemen v. Jefferson Co., Ky.</i> , 96 F.3d 1448 (6th Cir. 1996).....	25
<i>Eisen v. Carlisle &amp; Jacquelin</i> , 417 U.S. 156, 17778 (1974).....	21
<i>Eisenberg v Gagnon</i> , 766 F.2d 770, at 786 (3rd Cir.,1985).....	31
<i>Ernst v. Borough of Fort Lee</i> , 739 F.Supp. 220 (DNJ,1990).....	24
<i>Ford v. City of Boston</i> , 154 F.Supp.2d 131 (D.Mass.2001).....	26
<i>Gary v. Sheehan</i> , 1999 U.S. Dist. LEXIS 5616 (E.D. 111.1999), appeal denied, 188 F.3d 891 (7th Cir. 1999).....	25
<i>General Tel. Co.</i> , 446 U.S. at 330, 100 S.Ct. at 1706.....	30

<i>Georgine v. Amchem Prods., Inc.</i> , 83 F.3d 610, t 626 (3d Cir. 1995).....	28
<i>Hoxworth v. Blinder, Robinson &amp; Co., Inc.</i> , 980 F.2d 912, 923 (3d Cir.1992).....	31
<i>In re School Asbestos Litig.</i> , 789 F.2d 996, 1011 (3rd Cir. 1986), cert, denied, 479 U.S. 852 (1986).....	22
<i>Kennedy v. Los Angeles Police Dept.</i> , 901 F.2d 702 (9th Cir. 1989).....	26
<i>Mack v. Suffolk County</i> , 91 F.R.D. 16 (D.Mass. 2000).....	26
<i>Marriot v. County of Montgomery</i> , 227 F.R.D. 159 (NDNY, 2005) <i>aff'</i> , 2005 WL 3117194 (2d Cir. 2005).....	3,12,25-26,
<i>Mary Beth G v. City of Chicago</i> , 723 F.2d 1263 (7th Cir. 1983).....	26
1 <i>Newberg</i> §3.10, at 350 to 352.....	28
1 <i>Newberg</i> §3.13, at 375.....	31
<i>Newton v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 259 F.3d 154, 183 (3d.Cir.2001).....	30
<i>Nilsen v. York County</i> , 219 F.R.D. 19 (D. Me. 2003).....	26,29
<i>O'Brien v. Borough of Woodbury Heights</i> , 679 F.Supp. 429 (D.N.J.1988).....	24
<i>Owens v. County of Del.</i> , 1996 WL 476616 (E.D. Pa. Aug. 15, 1996).....	29
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797, 809 (1985).....	23
<i>Roderique v Kovac</i> ; 1987 WL 17058 (DNJ).....	24,25
<i>Savard v. Rhode Island</i> , 338 F.3d 23, 26 (1st Cir. 2003).....	26
<i>Smith v. Montgomery Co.</i> , 574 F. Supp. 604 (D. Md. 1983).....	26
<i>Tardiff v. Knox County</i> , 218 F.R.D. 332 (D. Me. 2003), <i>aff'</i> , 365 F.3d 1 (2004).....	26,29
<i>The Prudential Ins. Co. Of America Sales Practices Litigation</i> , 962 F.Supp. 450 (DNJ, 1997).....	22
<i>Tyson v. City of New York</i> , No. 97 Civ. 3762 (S.D.N.Y.March 18, 1998).....	26
<i>Sec. and Law Enforcement Employees, Dist. Council 82 v. Care</i> , 737 F.2d 187 (2d Cir. 1984).....	29
<i>Shoemaker v. Handel</i> , 606 F. Supp. 1151, 1157 (D.N.J. 1985).....	29
<i>Stewart v. Abraham</i> , 275 F.3d 220,228 (3rd Cir.,2001).....	22,26,31

*Weber v. Dell*,  
804 F.2d 796, 802 (2d Cir. 1986)..... 24

*Weiss v. York Hospital*,  
745 F.2d 786, 811 (3d Cir. 1984)..... 34

*Wood v. Hancock County Sheriff Dep'*  
354 F.3d 57, 63 (1st Cir. 2003)..... 29

*Zinberg v. Washington Bancorp, Inc.*,  
138 F.R.D. 397, 405 (DNJ 1990)..... 26

## **I. INTRODUCTION**

Plaintiff requests class certification based upon his 42 USC §1983 civil rights action seeking declaratory and injunctive relief for a class of Plaintiffs charged with non-indictable offenses from 2003 to present who were and are this minute being strip and body cavity searched by Defendants' Burlington County Jail ("Burlington") and Essex County Correctional Facility ("Essex") during intake, without an individualized, articulation of a reasonable basis that the arrestee is concealing drugs, contraband or weapons. Plaintiff was charged with a non-indictable offense and strip and body cavity searched at both Defendants' jail and correctional facility. Defendants' deposition testimony confirmed that it is their custom and policy to direct all arrestees charged with non-indictable offenses from March 3, 2003 to present to strip naked before an officer, and in the case of Defendant Essex, before many officers and strip naked as a group, during processing without first determining if there is an individualized reasonable basis or suspicion that the search would lead to the discovery of contraband, drugs or weapons. The core question of law and fact shared between Plaintiff and the putative class members is whether the Defendants violated the federal civil rights of arrestees charged with non-indictable offenses when, during processing, when they directed those arrestees to strip naked without first articulating a reasonable suspicion that those arrestees were hiding drugs, contraband or weapons.

## **II. FACTS**

### **A. Plaintiff Was Arrested Upon an Invalid & Erroneous Warrant Charging Him With a Non-Indictable Offense of Hindering Prosecution 2C:29-3**

On April 25, 2003 Essex County Superior Judge Honorable Joseph Falcone signed a warrant charging Plaintiff with NJ 2C:29-3, hindering prosecution, which related to a \$1,574.00 fine Plaintiff was paying off to the Essex County Probation Department (the "Warrant")(**Exhibit**

“**A**”). Plaintiff satisfied the fine on April 29, 2003 (**Exhibit “B”**-Essex County Superior Court Collections Inquiry<sup>1</sup>). On October 10, 2003 the Essex County Probation Department executed a Warrant to Satisfy confirming that Plaintiff satisfied the judgment and that the Essex County Clerk was notified of the satisfaction (the “Satisfaction”) (**Exhibit “C”**). The Warrant was satisfied and thus invalid as of 2003.

About two years after Plaintiff satisfied the Warrant, on March 3, 2005 he was arrested pursuant to the Warrant during a traffic stop of his vehicle being driven by his wife in Burlington County (**Exhibit “D”**-Plaintiff’s Deposition,47-48:17-20). Plaintiff produced the October 10, 2003 Satisfaction that was in his glove compartment to the arresting Officer and explained the case was closed in 2003 (see **Exhibit C** -a true and correct copy of the original that Plaintiff showed the Officer<sup>2</sup>)(**Exhibit “D”** 50-51:20-5; 52-53:13-2). Despite the Satisfaction evidencing the Warrant was invalid, Plaintiff was arrested pursuant to the “Warrant” and transported to Defendant Burlington County Jail as a holdover awaiting Defendant Essex to pick him up and transport him to their facility (**Exhibit “D”** 203-204:23-3). Plaintiff was committed first to Defendant Burlington County Jail and then to Defendant Essex County Correctional Facility upon the non-indictable offense of hindering prosecution, 2C:29-3, a civil contempt (**Exhibit “E”**-Defendant Burlington’s March 3, 2005 CJIS Response listing warrant for civil contempt & Inmate Intake Record of Plaintiff listing charge “civil contempt”; Defendant Essex Commitment Summary & see section IIA(i)(b) Defendants’ Witness testimony confirming Plaintiff was arrested upon a non-indictable civil contempt charge)

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<sup>1</sup> The handwriting on page 1 is that of the court clerk who presented the document to Hon. Joseph Falcone on March 10, 2005 when Plaintiff was brought before him that date on the invalid warrant.

<sup>2</sup> The Satisfaction dated October 10, 2003 has a March 9, 2005 date stamped at the top by the “Superior Court of NJ” with a clerk’s name beneath that. That 2005 stamp resulted from the Essex County Clerk stamping the document upon Plaintiff’s wife producing it to Essex County Superior Court on March 9, 2005 to protest Plaintiff’s wrongful arrest.

**i. Arrestee Processing at Defendant Burlington County Jail**

**a. Plaintiff's Testimony of His Processing at Burlington County Jail Confirms He Was Stripped Naked & Body Cavity Searched In a Prison Shower Area by an Officer Who Directed Him to Strip Naked, Turn Around & Manipulate His Genitals, Without A An Articulation of Reasonable Suspicion that Plaintiff, As a Holdover on a Non-indictable Offense of Contempt, Was Concealing Drugs, Contraband or Weapons to Warrant a Strip and Body Cavity Search**

Plaintiff was directed to what resembled a large closet with a blanket over it and a shower to the rear with a partial wall (**Exhibit "D"** 67:5-18;68:20-25). An Officer directed him to remove all of his clothes, and while naked he was directed to open his mouth, lift his tongue, hold his arms out, turn fully around, lift his genitals (**Exhibit "D"** 69-70:16-9). Plaintiff stood naked at about arms length, directly in front of the Officer who sat on bench while he directed Plaintiff how to undress, turn and manipulate his genitals in front of him (**Exhibit "D"** 212-214:20-2). The Officer never gave Plaintiff Kwell soap nor instructed him how to use Kwell, but instead directed Plaintiff to use just the bar of soap in the shower (**Exhibit "D"** 72:11-13;73:2-10;218:11-20). The Officer then left the shower room curtain but left the "curtain" half open so officers could occasionally watch the naked Plaintiff (**Exhibit "D"** 214-215:16-11).

**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"**

Although every officer and warden witness below testifies that Plaintiff should never have been strip searched because he was processed as a non-indictable offense, they use a term they created called a "visual observation" as a matter of semantics to avoid saying Plaintiff was

strip searched. 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 Defendant's 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).

**- 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 (**Exhibit “F”** 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 (**Exhibit “F”** 7:19-25).

Officer Reeder confirmed Plaintiff's charge was Civil Contempt which prohibits a strip search because it is a non-indictable charge (**Exhibit “F”**13-14:13-2). The March 3, 2005 Strip Search Authorization Form related to this incident, signed by Sergeant Chilton (see Exhibit N), confirms Plaintiff was visually observed by an officer while Plaintiff was naked (**Exhibit “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 (**Exhibit “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 (**Exhibit “F”**14:3-17;19:5-7; 28:16-22). He defines a body cavity search as a visual inspection (meaning “just looking”) or manual search (meaning “manually touching”) of a person’s anal or vaginal cavity when an inmate can pull something out of their body voluntarily, else they get medical staff to do it (**Exhibit “F”**19-20:10-16).

Interestingly, Officer Reeder testified that there is no difference between a “visual observation” and a “visual inspection” of a naked body (**Exhibit “F”** 21:1-7) in face of the legal definition of a strip search being the removal or rearrangement of clothing to permit **the visual inspection** (emphasis added) of a person’s undergarments, buttocks, anus, genitals and breasts (see NJSA 2A:161-A1), and despite strip searching a non-indictable arrestee being prohibited by NJ Corrections Statute 10A:31-8.4 “unless there is reasonable suspicion that a weapon, controlled dangerous substance or contraband will be found.” Thus, in fact, he is conducting and he is training his officers to conduct strip searches upon every non-indictable arrestee, without reasonable suspicion of contraband, drugs or weapons made beforehand.

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 (**Exhibit “F”** 37:1-11).

**- Officer Charles Palmer**

Officer Charles Palmer worked for Defendant Burlington since 2000, usually working the 7-3 and 11-7 shifts (**Exhibit “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

(**Exhibit “G”** 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 (**Exhibit “G”** 6-7:8-20;8:8-14;9-10:14-24;12-13:24-12;23-24:8-1). Interestingly, his “visual observations” of non-indictables have resulted in his finding piercings and tattoos on genitals (**Exhibit “G”** 13:13-20), meaning he inspects their genitals.

When asked what the difference is between NJSA 20:1-61 A3 defining 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” and his “visual observation”, he stated the difference is that in a visual observation “I’m not checking in their anus.” (**Exhibit “G”** 20-21:5-4). However, checking “in their anus” is not a strip search, but it is a strip search to direct the arrestee to remove or rearrange their clothing to their undergarments, and in this case, naked. 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 (**Exhibit “G”** 21:7-15;24:2-7). The visual observations he described are conducted by all officers pursuant to custom and policy and policies and procedures of the jail and pursuant to the jail’s direction (**Exhibit “G”** 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 (**Exhibit “G”** 26:19-25).

**-Officer Sean M. Gallagher**

Officer Sean M. Gallagher worked at Burlington County Jail for 10 years since 1996 (**Exhibit “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” (**Exhibit “H”** 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 (**Exhibit “H”** 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 behind a curtain 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 (**Exhibit “H”** 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). Interestingly, during these “visual observations” he asks the arrestee to lift their genitals if they have hanging genitalia so he can search for contraband or look for tattoos there (**Exhibit “H”**15-16:14-25);thus, being a more intrusive strip search.

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 (**Exhibit “H”** 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” (**Exhibit “H”** 21:9-23). He also 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 (**Exhibit “H”** 22:5-25). Thus, his testimony

along with his admissions means that he is strip and body cavity searching non-indictable arrestees without reasonable suspicion of their hiding contraband, weapons or drugs and without filing the proper strip and body cavity search forms as mandated by law (see Exhibit M, New Jersey Corrections Statute 10A:31-8.4). He testifies that during his visual observation of the naked arrestee he is looking for hidden contraband (**Exhibit "H"** 30:17-21); yet strip searches are the process used for searching for contraband, so his "visual observation" is actually a strip search. He testified that if a court ordered officers to stop visually observing these non-indictable arrestees naked then he would comply (**Exhibit "H"** 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 (**Exhibit "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 believed it related to a missed court date or a child support matter (**Exhibit "I"** 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 (**Exhibit "I"** 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 (**Exhibit "I"** 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 (**Exhibit "J"** 3:15-19). He testified that he executed Plaintiff's Strip Search Authorization Form as "not

strip searched" (see Exhibit N) because Plaintiff was admitted for a failure to appear, which is a non-indictable offense mandating a "visual observation" (**Exhibit "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 (**Exhibit "J"**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 (**Exhibit "K"**5-6:1-18;8:3-8). He confirmed Plaintiff was admitted as a holdover on a non-indictable of a civil contempt that does not mandate a strip search (**Exhibit "K"** 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 (see Exhibit 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. (**Exhibit "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" (**Exhibit "K"** 31:7-17). , Despite the semantics, there is only one strip search definition the Warden and his officers should be following, and that is State law that has been consistent with Federal law since this District's holding since 1987 in *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987), as detailed in hereinbelow. *Davis* and its state and federal progeny confirm Defendant Burlington has been and this very minute is violating State and Federal law during this class period of

March 3, 2003 to the present date.

**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”) (**Exhibit “L”**) and (b) New Jersey Corrections Statute 10A:31-8.4 (**Exhibit “M”**). Defendant Burlington’s officer and warden witnesses testified that 1186 is the policy they follow with respect to strip searching at the jail (Exhibit H 28-29:25; 30:4-16;35:7-25;Exhibit K 60:12-22; Exhibit 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" (**Exhibit “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**

It has been established herein above that Plaintiff was admitted to Defendant Burlington upon a non-indictable charge. He was later transferred to Defendant Essex. Every officer and warden witness for Defendant Essex testifies that every arrestee admitted on non-indictable charges is directed to strip naked in a group of at least 3 other arrestees and observed naked by officers. Plaintiff testified they were further directed to squat and cough. 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.”, According to the law and testimony, Defendant Essex’ officers are strip searching non-indictable arrestees, and in

violation of the law, they are doing it without articulating a reasonable basis of hidden drugs, contraband or weapons. 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).

**a. Plaintiff’s Testimony of His Processing at Defendant Essex Confirms He Was Stripped Naked & Body Cavity Searched In a Prison Shower Area With Officers & Other Arrestees & Persons Present Observing Plaintiff & Others Squat & Cough & Manipulate Their Genitals as a Group Stripped Naked, Without Articulating a Reasonable Basis that Plaintiff Was Concealing Drugs, Contraband or Weapons to Warrant a Strip and Body Cavity Search**

On March 9, 2005 Defendant Essex picked Plaintiff up from Defendant Burlington County Jail and booked him at about 11:59 p.m. (see Exhibit E). Plaintiff was fingerprinted and photographed then directed to a room where arrestees could make a phone call (**Exhibit “D”** 123:9-11,124:13-17). At that room Plaintiff and any one else there could see through a window a shower area and watch groups of arrestees strip naked before Officers (see Florence July 31, 2007 Certification). Twenty-five minutes later, Defendant Essex’ officers ordered Plaintiff to another room that had what he described as five “closets”, which were showers, where Defendant Essex’ officers ordered five arrestees at a time to enter, remove all of their clothes and shower (**Exhibit “D”** 127:3-13; 128:8-12). Plaintiff and the arrestees stripped while two officers watched (**Exhibit “D”** 215- 216:22-5,9-11). In front of each arrestee was a stool where they placed their clothes after they stripped (**Exhibit “D”**192:7-10). Plaintiff showered and stood naked before two of Defendants’ officers and four other naked arrestees, standing side by side, where they were ordered to open their mouths and lift their genitals (**Exhibit “D”** 128-129:16-2;

176-177:25-4;191:1-3;97:17-18;198:7-18). When ordered to lift his genitals, Plaintiff froze because he remembered the painful experience of being ordered by Defendant Burlington to strip naked and lift his genitals just 6 days earlier (**Exhibit “D”** 129:2-6). Defendant Essex’ officer persisted in the order for Plaintiff to open his mouth and lift his genitals while standing naked, then lift his arms shoulder length, turn around, and once Plaintiff and the four other arrestees’ naked backs faced the officers, they were ordered to squat and cough and turn back around to face the officers, naked (**Exhibit “D”** 129:6-16). Other officers present stared at Plaintiff and the other naked arrestees, and each naked arrestee could see the other standing naked (**Exhibit “D”** 129-130:23-10). Plaintiff described the “strip search” as humiliating, giving him the same uncomfortable experience he had when stripped naked at Defendant Burlington, where officers, grown men, were staring at him naked like a game to them (**Exhibit “D”** 130:10-20; 135:5-6). He explained that Defendant Essex’ two officers who watched him and the other arrestees naked would whisper to each other, making Plaintiff uncomfortable while he stood naked before them (**Exhibit “D”** 189:13-22). After the shower area, the arrestees proceeded to see a nurse (**Exhibit “D”** 131:2-3).

**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 (**Exhibit “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 (**Exhibit “O”** 13-14:23-11; 16-17:21-1). He testified that during processing

Defendants' officers call three arrestees at a time to enter the shower area (**Exhibit "O"**19:21-23;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 (**Exhibit "O"**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 (**Exhibit "O"**23:4-5; 25:21-25). The arrestees stand naked about two to three feet from each other (**Exhibit "O"** 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 (**Exhibit "O"**24:12-16,22-24). The procedure is that the officer should keep his eyes on the naked inmates (**Exhibit "O"** 33-34:22-5). He confirmed again in concluding his testimony that everyone is treated the same at the shower area, whether they are there for a traffic offense under Title 39, which is not a crime, or for murder (**Exhibit "O"** 34:6-16).

**- Intake Officer Richard Monroig**

Richard Monroig is a corrections officer with Defendant Essex since 1995 who works intake (**Exhibit "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 (**Exhibit "P"** 9-10:22-1). Processing officers are never trained as to what charge is indictable or non-indictable (**Exhibit "P"** 37:22-25). He has seen contempt of court and traffic court arrestees come through intake, and they all get processed the same way (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 (**Exhibit "P"**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 (**Exhibit**

“P”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, (**Exhibit “P”**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 (**Exhibit “P”**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 (**Exhibit “P”** 17:16-25).

**- Lieutenant Michael Salzano**

Michael Salzano started as an officer at Defendant Essex in 1987 and became lieutenant in 2004 (**Exhibit “Q”** 4:15-21). He is in the shower room daily as part of his rounds (**Exhibit “Q”** 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 (**Exhibit “Q”** 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 (**Exhibit “Q”**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 (**Exhibit “Q”**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 (**Exhibit “Q”**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 (**Exhibit “Q”**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 (**Exhibit “Q”**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.” (Exhibit “Q”21:14;21-22:21-9,17-20). Intake does not separate indictable from non-indictable offenses (Exhibit “Q”32:13-19).

**- Warden Larry Glover**

Warden Larry Glover was the warden at Defendant Essex County Correctional Facility since July, 2004 (Exhibit “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 (Exhibit “R”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 (Exhibit “R” 25-26:12-15).

**c. Defendant Essex’ Officer Witness Testimony Confirms Their Intake Shower Processing is a Strip Search & Body Cavity Search, Defining a Strip Search as Stripping Someone Naked & a Body Cavity Search as Including a Squat & Cough**

Plaintiff testified that he was stripped naked and directed to squat and cough when processed at Defendant Essex. 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 (Exhibit 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 (Exhibit P 23:5-8;25:8-12). Lieutenant Salzano defines a squat and cough is part of a body cavity search (Exhibit 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 (Exhibit R 11:2-8;33:1-16).

**d. State of New Jersey Statutory Definitions of “Strip Search”, New Jersey Attorney General Guidelines & Defendants’ Own Internal Policies Confirm That Defendant Essex’ 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 Essex, the following was provided: (a) Attorney General’s Strip Search and Body Cavity Search Requirements and Procedures for Police Officer’s (“AG Policies), (b) New Jersey Corrections Statute 10A:31-8.3-7, (c) Criminal Justice Code 2A:161A-1-4; and (d) Defendant Essex’ internal policies entitled “Department of Public Safety General Order” number 89-17, 9/27/02 and Directive 04-06.

(a) The AG policies define a strip search as the “removal or rearrangement of clothing to permit visual inspection of a person’s undergarments, buttocks, anus, genitals or breasts.” A strip search does not include removing or rearranging clothing because medical assistance is required, which this portion is inapplicable to this motion as Defendants witnesses all testified they indiscriminately strip search everyone who appears before them at intake; medical issues are not even an issue at that point. Thus, the strip search occurs unlawfully according to this definition. The AG Policies define a body cavity search as the visual or manual search of a person’s anal or vaginal cavity and it must be done by a medical professional. If there are no exigent circumstances to the search, then it must be done pursuant to a warrant or by consent, or if there is reasonable suspicion to search because of possible weapons or contraband. A host of reporting requirements must be filed by the persons and their superiors conducting and authorizing the search. Defendants witnesses all testified that they never determine anything at the shower room other than directing every one who enters there to strip naked as a group and

turn around naked. No reporting is completed for the shower room procedure; thus, Defendant Essex' shower room processing violates the AG policies.

(b) 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. Defendant Essex' Warden and Officer witnesses confirmed that the law governing their strip and body cavity procedures is this Corrections Code 10A (Exhibit O 35-36:21-3;Exhibit P 6:17-25;Exhibit R 44:17-21;); however; 10A follows 2A:161A-2 which defines Defendant Essex' processing as nothing but a strip search (see (c) below), and conducted in violation state and federal laws.

(c) 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 serach 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. Notably, Defendant Essex does not even allow undergarments on; they fully strip every arrestee naked and visually inspect each person naked, without reasonable suspicion ever being articulated. Defendant Essex’ processing procedure violates State law, no less it is prohibited by federal law (discussed in detail herein below).

(d) 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...”. It mandates “9. Body cavity searches shall take place when legally authorized... conducted by a licensed physician...in a medically acceptable manner and environment...” 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 state and 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 (Exhibit R 24-25:12-9). Every witness testified to the same group strip procedure as detailed herein above. So a group of at least 3 arrestees stand completely naked among each other and before an officer while their clothes are searched and the arrestee is visually observed by the officer. 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.

Notwithstanding Federal law prohibiting such strip searches, even just considering the above (a)-(d), New Jersey law, Attorney General Guidelines and Defendant Essex' own policies in relation to Defendant Essex' witness testimony summarized in above, it is crystal clear that Defendant Essex' policy and custom during processing of non-indictable arrestees violates the law defining a strip search as a visual observation of a person in their undergarments that should be accomplished in private and a body cavity search is defined as observing the person's anal or vaginal cavity (See N.J.S.A. 2A:161A3). Defendant Essex goes beyond the bounds of the law's strip search definition of respecting a citizen's privacy by ordering all arrestees to strip completely naked as a group without ever making an individualized suspicion or articulable reason that any arrestee is concealing drugs or contraband to warrant a strip search. Defendant Essex' processing officers violate the law further by never completing the written records to justify these strip searches as mandated by law and their own written policies because they do not consider this a strip search.

### **III. ARGUMENT**

#### **A. A Motion for Class Certification is Given Liberal Construction, Limited to R. 23 Elements, & the Merits of the Case Have No Impact Because Plaintiff's Allegations are Deemed True**

Plaintiffs' allegations in the class complaint are taken as true, and inquiry into the merits is improper except to determine whether there is a realistic claim. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 17778 (1974). Class certification should not resolve the merits of the case, but limits the court to deciding if the 4 elements of R. 23, being numerosity, typicality, commonality

and adequacy exist. *The Prudential Ins. Co. Of America Sales Practices Litigation*, 962 F.Supp. 450 (DNJ, 1997). This Circuit holds that a court should err in deciding in favor of class certification in a close case because a class can always be decertified. Rule 23(c)(1); *In re School Asbestos Litig.*, 789 F.2d 996, 1011 (3rd Cir. 1986), cert. denied, 479 U.S. 852 (1986). Plaintiff contends this is not even a matter of being a close case, but it is a case on point mandating class certification as the issue is simple: Plaintiff was one of a class of persons strip searched on a non-indictable offense without Defendants ever first articulating a reasonable basis that he or those similarly situated were hiding drugs, contraband or weapons. Furthermore, Defendants admit they have a custom and policy of strip searching every arrestee in their shower areas, no matter what their charge is and they have been doing so since the start of this class period of March, 2003 to date. That admission violates State and Federal laws prohibiting blanket strip searches (as discussed hereinbelow). Thus, a class of tens of thousands of persons, including Plaintiff, exists and class certification will rectify this problem. Part of rectifying the problem is accomplished by this §1983 action requesting declaratory and injunctive relief of this unconstitutional practice. Since Defendants unlawfully strip searches tens of thousands of non-indictable arrestees and continues that unlawful conduct to date and this Circuit holds class certification should be granted in §1983 actions involving declaratory and injunctive relief, *Stewart v. Abraham*, 275 F.3d 220,228 (3rd Cir.,2001), then class certification for this case is proper to commence the declaratory and injunctive relief requested.

There is more logic in favor of certifying this case as a class action. A class action has two purposes: (1) to accomplish judicial economy by avoiding multiple suits; and (2) to protect the rights of persons who might not be able to present claims on an individual basis. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). The United States Supreme Court holds the class action

procedure as a superior method of adjudicating cases such as the one at bar where the numerous claims are too small to litigate individually. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility ..."). In the case at bar, we are concerned with the constitutional rights of tens of thousands of arrestees charged with non-indictable offenses from 2003 to date who were and are to this minute still being ordered by Defendant Essex to remove all of their clothes before their Officers and other arrestees, and further directed to manipulate their genitals and squat and cough. That is an unlawful strip search and body cavity search violating New Jersey State law, New Jersey Attorney General Guidelines, Defendants' own policies and the United States Supreme Court law (as discussed herein above) Strip and body cavity searches of arrestees without exigent circumstances violates their Constitutional rights under the Fourth Amendment. The thousands of arrestees in this case are numerous (see section B(i) below), and may be dispersed not only in the Defendant County but nationwide as not always do arrestees reside in state. As well, many could have moved since their arrests relevant to the class period. Finally, strip search class actions nationwide average settlements of about \$1,500.00 per person unconstitutionally strip searched (**Exhibit "S"** *Leyba v. Santa Fe* and *Ryan v. Garvey* recent settlements notices of jail strip search class action). Thus, the economy of a class action is needed in this case noting the numerosity and the small amount of each claim. The wrongdoing of Defendants' blanket strip search policy in this case is confirmed by this District, and Districts nationwide have certified such wrongdoing for class action status.

**i. 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**

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 Court 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 as well refused to accept the defendant jail's attempt to claim their blanket strip search policies conformed with then state law as the court held 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 by December 1985 (the strip search of Plaintiff herein occurred in 2003 and the class period covers March 3, 2003 to date). 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 strips searched for weapons and contraband. This Circuit in *Roderique* concurred with *Weber v. Dell*, 804 F.2d 796, 802 (2d Cir. 1986) that held 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. 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 due 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. In *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987) 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 held blanket strip searches unconstitutional and found unconstitutional a policy of strip searching all arrestees, regardless of the nature of their offense and where no suspicion of harboring contraband regarding the arrestee existed. Id. at 401. 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

**ii. Circuit Courts Nationwide Certify §1983 Class Actions Alleging Prison Strip Searches of Arrestees Charged with Non-Indictable Offenses**

Circuit Courts nationwide hold class certification most suitable for prison facility strip search §1983 claims, and certified such classes, to wit: *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); *Marriott v. County of Montgomery*, 426 F.Supp. 2d 1 (NDNY 2006) ( granting summary judgment that strip searches unconstitutional, permanent injunction and interim award of attorneys' fees);

*Kahler v. County of Rensselaer*, No. 03-CV-1324 (NDNY 2004) (strip search class action settlement preliminarily approved via order); *Dodge v. County of Orange*, 209 F.R.D. 65 (SDNY 2002); *Dodge v. County of Orange*, 226 F.R.D. 117 (SDNY 2005); *Mary Beth G v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Byum v. D.C.*, supra; *Ford v. City of Boston*, 154 F.Supp.2d 131 (D.Mass.2001); *Gary v. Sheehan*, 1999 U.S. Dist. LEXIS 5616 (E.D. 111.1999), appeal denied, 188 F.3d 891 (7th Cir. 1999) (District Court denied defendants' motion to decertify class of court returns strip searched after being returned to jail after cases dismissed for purposes of damages); *Mack v. Suffolk County*, 91 F.R.D. 16 (D.Mass. 2000) (District Court granted certification of class of female arrestees challenging a policy of subjecting all female arrestees to blanket strip searches); *Gary v. Sheahan*, 1999WL 281347 (N.D. Ill.March 31, 1999); *Tyson v. City of New York*, No. 97 Civ. 3762 (S.D.N.Y.March 18, 1998); *Eddlemen v. Jefferson Co., Ky.*, 96 F.3d 1448 (6th Cir. 1996); *Smith v. Montgomery Co.*, 574 F. Supp. 604 (D. Md. 1983); *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir. 1989) (invalidating policy requiring visual body cavity searches of all felony arrestees regardless of reasonable suspicion), *Savard v. Rhode Island*, 338 F.3d 23, 26 (1st Cir. 2003) (holding 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); *Calvin v. Sheriff Of Will County*, 2004WL1125922 (N.D. Ill. May 17, 2004); *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607 (W.D. Wis. 2003); *Tardiff v. Knox County*, 218 F.R.D. 332 (D. Me. 2003), *aff'*, 365 F.3d 1 (2004); *Nilsen v. York County*, 219 F.R.D. 19 (D. Me. 2003); see also settled class action cases identical to this case's allegations at Exhibit S.

## B. ELEMENTS OF CLASS CERTIFICATION PURSUANT TO R. 23

### i. Numerosity

The Third Circuit holds that if plaintiff can show the class exceed 40 persons than numerosity is met. *Stewart v. Abraham*, 275 F.3d 220 (3rd Cir.,2001). In any event, common sense assumptions of numerosity is the rule as precise enumeration is not necessary. *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (DNJ 1990). The class in this case is defined as those persons charged with non-indictable offenses who were ordered to strip naked before Defendants during processing at their jail facilities without an individualized reasonable suspicion or articulation that said arrestee was hiding drugs, contraband or weapons from March 3, 2003 to date.

Defendant Burlington testified that they process about 550 a month (Exhibit I 13:12-18; 13:24-25;33-34:25-6). Officers testified that Defendant Burlington receives about 30 arrestees a day, with a little more than half of those being non-indictables (Exhibit G 5:8-21), and an estimated 15-20 non-indictables are visually observed by one officer a week during processing (Exhibit H 25-26:22-3;49:17-24). Multiply that estimated 15 arrestees a week by 56 weeks equals about 840 non-indictables a year times the four years this case covers to date, equals about 3,360 putative class members. Confirming the thousands of non-indictables making up this class is the attached disk containing copies of Defendants' Burlington's and Essex' disks produced in this case listing thousands of putative class members admitted for non-indictable offenses listed on each disk<sup>3</sup> (**Exhibit "T"**). Defendant Burlington's disk has 1,304 pages of non-indictable arrestees processed from March 3, 2003 through March 12, 2007. Defendant Essex' disk has 1,134 pages of non-indictable arrestees processed from March 3, 2003 through

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<sup>3</sup> The disks contain names and contact information that, although it is public record, Plaintiff reminds this Court that the disks are for Court's eyes only at this point. The original disks contained over 1,000 pages each, so duplicating the disks on one disk was more economical for purposes of this Brief.

March 11, 2007 The average number of arrestee per page is 3. Thus, multiplying 3 for each defendant's disk realizes an average of 3,912 putative class members from Defendant Burlington and 3,402 from Defendant Essex. The number of class members increases daily since March, 2007 because Defendants conduct these blanket unlawful strip searches daily on every non-indictable offense without reasonable suspicion of drugs, contraband or weapons ever made. Clearly there are more than 40 putative class members from each of Defendants' facilities. Definitely there are thousands of class members from 2003 to date. Numerosity is satisfied.

## **ii. Commonality**

The Third Circuit follows the approach of applying the commonality and predominance tests of FRCP 23(a)(2) and (b)(3) together. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, t 626 (3d Cir. 1995). Thus, there must be "questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). To satisfy this requirement, the named plaintiff need only to "share at least one question of fact or law with the grievances of the prospective class." *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir.1994). Commonality is "easily met," because it is satisfied by the presence of a single common issue. 1 *Newberg* §3.10, at 350 to 352.

In the case at bar, there is one glaring single thread of fact running between every putative class member arrestee processed at Defendants' facilities and the named Plaintiff processed at those facilities: they were all processed upon a non-indictable charge at Defendants' facilities and ordered to strip naked while observed by Defendants' officers. Defendants admit they process every arrestee the same way whether they are indictable or not-they are directed to strip naked before officers and never do those officers file a report that a reasonable suspicion existed because they do not consider it a strip search. Defendant Burlington considers it a "visual observation" where no reasonable suspicion is required. However, semantics will not defeat the

fact that Defendant Burlington is actually conducting a strip search. *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's mouth or lift one's 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). Defendant Essex considers it routine processing to treat every one the same, so they do not file a strip search report because they do not consider it a strip search. 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). It only matters that they were all ordered to strip without any articulation of a reasonable suspicion of drugs, contraband or weapons made, all in violation of Plaintiff's and the class members' Fourth Amendment rights.

In the case at bar there is one common law existing between Plaintiff and every class member, which is the Fourth Amendment's and state laws prohibition against strip searching an arrestee for a non-indictable offense when there is no individualized reasonable suspicion of their hiding weapons, drugs or contraband. The law is clear that a non-indictable arrest does not give rise to reasonable suspicion, yet Defendants testify they will strip everyone naked and view their naked bodies no matter what they are charged with. So if you happen to have an

outstanding traffic summons or you have a warrant for your arrest because you failed to appear at court, and you are arrested in Defendants' counties, then be assured that they will not make any individualized determination of whether you are there on a non-indictable offense or an indictable crime, and you will be stripped naked and observed by an officer. Worse, at Defendant Essex County you will be stripped naked among a group of other arrestees where all of you as a group of strangers will stand naked before strange officers. And depending who the officer is at the time, you will also be directed to expose and manipulate your genitals before them.

In sum, the common questions of law and fact front and center to this case would be whether the Defendants violated the federal civil rights of arrestees charged with non-indictable offenses when, during processing, they directed those arrestees to strip naked without first articulating a reasonable suspicion that those arrestees were hiding drugs, contraband or weapons.

### **iii. Typicality**

The Supreme Court stated that "[t]he typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs' claims." *General Tel. Co.*, 446 U.S. at 330, 100 S.Ct. at 1706. Here we assess whether the action can be efficiently maintained as a class action and whether the named plaintiff has incentives aligned with the interests of absent class members to ensure the absentee interests are protected. *Baby Neal*, *supra* at 5758; *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183 (3d.Cir.2001). Basically, it is the self-interest of the plaintiff that he is promoting that will promote the class as well: "[A] plaintiff with typical claims will pursue his or her own self-interest in the litigation and in so doing will advance the interests of the class members, which are aligned with those of the

representative." 1 *Newberg* §3.13, at 375. Typicality exists when the claims of the class representative and the class members arise from the same alleged course of conduct by the defendant, *Eisenberg v Gagnon*, 766 F.2d 770, at 786 (3rd Cir.,1985). The wrongful conduct that aggrieves both the named plaintiff and the putative class members will satisfy the typicality requirement even if there are different fact patterns underlying the individual claims. *Baby Neal*, supra at 58 "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the [absent] class members, and if it is based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir.1992) (quoting *1 Herbert B. Newberg, Newberg on Class Actions* §3.15 at 168 (2d ed.1985)). Ultimately, for typicality, the Court should focus on the defendant's wrongful course of conduct. Moreover, it is the declaratory or injunctive relief nature of §1983 civil rights action, as is the case at bar, and the numerous and often unascertainable class of persons that empowers the court to grant class certification for their benefit. *Stewart* at 228.

Plaintiff satisfies the typicality as he testifies he was strip searched in violation of his constitutional rights and Defendants admit the very strip search process he testified to is the same strip search process they subject every person in his position to, which is directing non-indictable arrestees to strip naked before officers without articulating a reasonable basis for doing so. Plaintiff's case serves the purpose of stopping that wrongful conduct typically applied to every person similarly situated.

#### **iv. Adequacy**

There are two factors to the adequacy element: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (2) the plaintiff must not have interests antagonistic to those of the class. *Hoxworth v. Blinder, Robinson & Co.*,

980 F.2d 912, 923 (3d Cir. 1992).

Plaintiff's deposition testimony and his July 31, 2007 Certification accompanying this motion confirms that he has been intimately involved in every aspect of this litigation, including reviewing the pleadings, correspondence and motions in this complex case (Exhibit D 179-181:13-20). He attended his deposition and appeared at a Defendant Burlington deposition to help identify a defendant witness. He has reviewed and participated in every pleading and case strategy from the start of this case. Plaintiff's mission is to stop Defendants' custom and policy of unlawful strip and body cavity searches of that class of persons charged with non-indictable offenses where there is no reasonable suspicion of drugs or contraband. Plaintiff's counsel has been just as adequate in the vigorous prosecution of this case. The case docket shows counsels' vigorous pursuit of this case. Every motion of Plaintiff's counsel has been granted because it was based on proper facts and law, while every opposition of Defendants has been denied. In fact, Defendants' positions of withholding discoverable information and opposing amending the complaint were based on frivolous arguments that were wholly insupportable while Plaintiff's arguments and presentation of the law were on point. In sum, Plaintiff's counsel has been on point with the law and the facts throughout this case, has never presented a frivolous argument and has persisted past Defendant's obstructions.

Plaintiff's counsel is comprised of a very qualified team of law offices, being Michael Calabro, Esq. and Susan Chana Lask, Esq. Mr. Calabro has been a licensed attorney since 1986 in the State of New Jersey and the District Court of New Jersey. He is a Certified Criminal Trial Attorney, a designation granted by the New Jersey Supreme Court to criminal trial attorneys who have demonstrated a high level of experience, education, knowledge, and skill in criminal trial practice. Prior to entering private practice, he served Essex County as a criminal prosecutor from

1986-1996 and was the Director of Narcotics Enforcement Operations at the Essex County Prosecutor's Office from 1992-1996. From 1988 to 1996 he taught criminal law to police academies as a Certified Instructor of the New Jersey Police Training Commission. He is a member of the Essex County, New Jersey State and American Bar Associations and the Association of Trial Lawyers of America and conducts criminal cases in both State and Federal courts. His expertise and knowledge of the New Jersey prison system from his career as an officer and his knowledge of New Jersey criminal law as a certified criminal trial attorney compliments Susan Chana Lask's class action, civil rights and police misconduct experience.

Susan Chana Lask, Esq. has an impeccable 20 year history practicing nationwide in State and Federal Courts. From 1981-1983 she studied with the then foremost sociologist and prison reform expert who wrote books on recidivism and prison policies. Ms. Lask personally visited and investigated prisons and prison system reform in the 1980's as part of her undergraduate studies as a double major in psychology and sociology and her masters program completed in 1983. Thereafter, she excelled in constitutional law during her law school studies in the mid-80's, including studying International Comparative Constitutional Law at Tel Aviv University. There she personally met with member's of Israel's Knesset (the comparative to our legislature) to discuss constitutional law and civil rights on an international basis. From 1986 through 1988 she worked at the highly respected law firm Rivkin, Radler, Dunne & Bayh's CERCLA unit. She was solely responsible for organizing several billion dollar complex, nationwide class action cases, including Morton Thiokol, James Brown Wood creosote environmental cases and the Agent Orange cases for lead defense counsel. Ms. Lask worked for the plaintiffs on the successful employee wage claim class action against Taco Bell in Los Angeles in 1996. In 2001 she filed a consumer fraud class action wherein her discovery resulted

in assisting several State Attorney General's Offices and other Federal Agencies to imprison and fine the perpetrators of the nationwide Miss Cleo consumer fraud. In 2006 she filed the consumer fraud class action against the makers of the pharmaceutical Ambien, and because of her efforts she achieved her initially stated goal for consumers nationwide when on March 14, 2007 the FDA ordered the exact stronger warnings that Ms. Lask's class complaint demanded a year before.

Ms. Lask conducts civil rights cases in State and Federal courts. She has conducted over 200 civil and criminal trials and hearings in State and Federal Courts during her career, and has handled thousands of cases in State and Federal Courts nationwide. From 1992-1994 she was counsel to the PBA in New York, giving her a wealth of experience in police conduct and procedures. She has been extremely committed to this case. Her filings are timely due to her commitment to bringing a just result to the class, and that commitment will continue. She as well has limited her case inventory so she can be dedicated to this action. She handled this case for 2 years and conducted extensive research on the merits of this class action as required pursuant to FRCP Rule 23(g)(1)(C). Every one of her motions is on point and has been granted in face of vigorous opposition by Defendants. She conducted 10 depositions of wardens and officers from each of Defendants' counties and was present for Plaintiff's deposition. She interviewed a multitude of witnesses and she consulted with former officers from Defendants' facilities. She reviewed the court records in related strip search class action cases nationwide, and contacted some 15 different counsel in those related cases to discuss this particular case and their cases so she is on track with what is happening in similar strip search class actions conducted nationwide. She is familiar with the New Jersey State criminal justice system, and the police holding operations for arrestees.

Plaintiff's counsels' commitment to this case is evident from the court docket, that speaks for itself. In fact, Plaintiff's counsel is ahead of the game as Ms. Lask has strategized notice and settlement options to simplify this process for this Honorable Court. In sum, Ms. Lask's and Mr. Calabro's offices as class counsel are more than "qualified, experienced and generally able to conduct the proposed litigation." *Weiss v. York Hospital*, 745 F.2d 786, 811 (3d Cir. 1984).

#### **IV. PLAINTIFF'S COUNSELS' PLAN TO MANAGE NOTICE & DAMAGES**

##### **A. Notice is Easily Manageable as Plaintiff's Efforts During Discovery Resulted in an Organized List of Names & Contact Information of Putative Class Members**

Pursuant to FRCP Rule 23 (c)(2)(B), plaintiff is to organize the best practical notice to the class members. Plaintiff has commenced organizing notice and is now awaiting class certification to implement notice. Namely, because of Plaintiff's vigorous efforts and motions that were on point, this Court's May 4, 2007 Order directed Defendants to release disks containing names and contact information of every class member who entered Defendants' facilities during the class period. Plaintiff had that information manipulated to show the non-indictable and Traffic offense charges so the class members can easily be located. With that information available, notice to each and every person on that list can be accomplished. Also, Plaintiff intends to follow the example of the recent class certification and settlement of the similar class action strip search case of *Leyba v. Santa Fe* (see Exhibit S). Plaintiff's counsel contacted the notice agency in the Santa Fe Strip Search case to manage notice here. Furthermore, Plaintiff's counsel has a website that will dedicate pages of notice to class members similar to the Santa Fe Strip Search Class Action. Plaintiff's counsel can notify the news media to publicize the class certification. Thus, no one would be missed as there will be nationwide exposure for the benefit of all class members, including those who may have moved

out of state or were out of state residents when processed at Defendants' facilities.

## V. CONCLUSION

The elements of FRCP 23 have been established by Plaintiff. This action is a §1983 civil rights violation requesting among other things, declaratory and injunctive relief to stop unconstitutional strip searches upon non-indictable arrestees without first articulating a reasonable basis that those persons are hiding drugs, contraband or weapons. The law holds that class certification in such 1982 cases is the best mode of adjudication. Plaintiff requests this Honorable Court to grant class certification for all those arrestees on non-indictable charges who during processing at Defendants' jail and correctional facility from March 3, 2003 to the present were directed to strip naked before officers without first articulating a reasonable basis of their hiding drugs, contraband or weapons.

/s Michael V. Calabro

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Newark, NJ

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