No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2020

DONALD GROCHOWSKI, as Administrator of the Estate of Kenneth Grochowski, decedent; and, DONALD and ADAM GROCHOWSKI, as next of Kin to Kenneth Grochowski,

Applicants/Petitioners,

v.

CLAYTON COUNTY, GEORGIA, through its Chair and Commissioners in their official capacities and KEMUEL KIMBROUGH in his official capacity;
VICTOR HILL, in his official capacity as Sheriff of Clayton County;
KEMUEL KIMBROUGH, individually and in his official capacity as the former Sheriff of Clayton County;
GARLAND WATKINS, individually and in his official capacity as the Chief Deputy of Clayton County,
ROBERT SOWELL, individually and in his official capacity as a Major and the Jail Administrator of the Clayton County jail; and,
SAMUEL SMITH, individually, and in his official capacity as the Security Section Commander of Clayton County Sheriff's Department,

Respondents.

Petition for Writ of Certiorari To the Eleventh Circuit

JOHN P. BATSON
1104 Milledge Road
Augusta, GA 30904
706-737-4040
jpbatson@aol.com

Attorney for Petitioners
Counsel of Record

November 19, 2020

Questions Presented.

Jail supervisor policymakers and Clayton County, Georgia were sued by detainee Grochowski's representatives for the known conditions and systems they controlled which caused an undetected in-cell assault in which Brooks, 20, killed Grochowski, 57, for Grochowski's candy. Jail and cell door design prevented meaningful in cell observation by a central tower guard when the cell door was closed. The screening/classification/housing process systemically ignored a record of assaults in making the final housing assignment of the "Medium" detainees, where Brooks had two assaults and Grochowski none. Long-term County underfunding had caused inadequate jail staff, causing the Sheriff to close a 96 cell housing unit that could have been used to single cell assaultive or disruptive detainees, who, when put in these double cells, in this jail increased the already substantial risk of undetected assaults.

Kinglsey v. Hendrickson, 576 U.S. 389 (2015), as applied in three other circuits, would apply an objective reasonableness test to remediate the conditions and systems creating a substantial risk of harm to Clayton detainees.

1. Did the trial court and panel failed to draw inferences in Grochowski's favor erroneously finding each condition did not present a substantial risk of harm, and by failing to consider the combination of the conditions, erroneously granting the jail supervisors qualified immunity and the County judgment, finding the conditions did not pose a substantial risk?

2. Should *Kingsley's* objective reasonableness test apply to the conditions and systems creating an unreasonable risk of harm to detainees, warranting denial of summary judgment?

3. Should legislative immunity shield a County representative from a deposition?

List of Parties.

Donald Grochowski	Appellant-Representative Administrator of the estate of Kenneth Grochowksi
Adam Grochowski	Appellant-Next of Kin of Kenneth Grochowski
Clayton County, through of the Commission	Appellee Chair, Jeffrey E.Turner
Victor Hill, in his official capacity	Appellee as Clayton CountySheriff
Kemuel Kimbrough, in his official and Individual capacity	Appellee-former Sheriff of Clayton as the former Sheriff of Clayton County
Garland Watkins, in his individual and official capacity	Appellee-Clayton County Sheriff Dept. Officer
Robert Sowell, in his individual and official capacity	Appellee-Clayton County Sheriff Dept. Officer
Samuel Smith, in his individual and official capacity.	Appellee-Clayton County Sheriff Dept. Officer

Certificate of Interested Persons.

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v.

CLAYTON COUNTY, GEORGIA, through its Chair and Commissioners in their official capacities and KEMUEL KIMBROUGH in his official capacity;
VICTOR HILL, in his official capacity as Sheriff of Clayton County;
KEMUEL KIMBROUGH, individually and in his official capacity as the former Sheriff of Clayton County;
GARLAND WATKINS, individually and in his official capacity as the Chief Deputy of Clayton County,
ROBERT SOWELL, individually and in his official capacity as a Major and the Jail Administrator of the Clayton County jail; and
SAMUEL SMITH, individually, and in his official capacity as the Commander of the Security Section of Clayton County Sheriff's Department,
Respondents.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURES

Name	Identification & Relationship
Donald Grochowski	Applicant/Petitioner Administrator of the Estate Kenneth Grochowksi
of Adam Grochowski	Applicant/Petitioner Next of Kin of Kenneth Grochowski
Donald Grochowski	Applicant/Petitioner Next of Kin of Kenneth Grochowski
Clayton County, through Chair, Jeffrey E. Turner of the Commission	Respondent
Victor Hill, in his official capacity as Clayton County Sheriff	Respondent

Kemuel Kimbrough, in his individual and official capacity as the former Sheriff Of Clayton County	Respondent-former Sheriff of Clayton County
Garland Watkins, in his individual and official capacity	Respondent-Clayton County Sheriff Dept. Officer
Robert Sowell, in his individual and official capacity	Respondent -Clayton County Sheriff Dept. Officer
Samuel Smith, in his individual and official capacity	Respondent -Clayton County Sheriff Dept. Officer

Clayton County Board of Commissioners

Jeffrey E. Turner	Chair
Sonna Singleton Gregory	District 1 Commissioner
Gail Hambrick	District 2 Commissioner
Felicia Fran kiln Warner	District 3 Commissioner
DeMont Davis	Vice-Chairman, District Commissioner

Attorneys Name	Identification & Relationship
John P. Batson	Attorney for Applicants/Petitioners
Sun Choy	Attorney for Respondents
Jack R. Hancock	Attorney for Respondents
Charles Reed	Attorney for Respondents
A. Ali Sabzevari	Attorney for Respondents

District Court Judge

Thomas W. Thrash, Jr.	Judge, U.S. District Court Northern District of Georgia

Eleventh Circuit Panel

David M. Ebel	Judge, Tenth Circuit, Sitting by Designation
Frank M. Hull	Judge, Eleventh Circuit
Stanley Marcus	Judge, Eleventh Circuit

Respectfully submitted this 19h day of November, 2020.

/s/ John P. Batson
John P. Batson
1104 Milledge Road
Augusta, GA 30904
706-737-4040
jpbatson@aol.com

Attorney for Applicants/Petitioners
Counsel of Record
Member of the Bar of the Supreme Court

List of Proceedings.

District Court

Grochowski v. Clayton County, 2018 U.S. Dist. LEXIS 167418 (N.D. Ga. Sep. 28, 2018) (Order entered September 28,2018).

Grochowski, et. al., *v. Clayton County, Georgia,* et. al., No. 1:14-cv-02586-TWT (N.D. Ga.) (Order entered September 28, 2018) (App. 24a - 58a).

Eleventh Circuit

Grochowski v. Clayton County, Georgia, 961 F.3d 1311 (11th Cir. 2020) (Order entered June 22, 2020).

Grochowski, et. al., *v. Clayton County, Georgia,* et. al, 11th Cir. No. 18-14567 (Order entered June 22, 2020) (App. 1a - 23a).

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United States Court of Appeals
for the Eleventh Circuit

Grochowski v. Clayton County, Georgia, 961 F.3d 1311 (11th Cir. 2020) (Order entered June 22, 2020).

Grochowski, et. al., *v. Clayton County, Georgia,* et. al, (11th Cir.) No. 18-14567 (Order entered June 22, 2020) (App. 1a - 23a).

United States District Court
for the Southern District of Georgia

Grochowski v. Clayton County, 2018 U.S. Dist. LEXIS 167418 (N.D. Ga. Sep. 28, 2018) (Order entered September 28,2018).

Grochowski, et. al., *v. Clayton County, Georgia,* et. al., No. 1:14-cv-02586-TWT (N.D. Ga.) (Order entered September 28, 2018) (App. 24a - 58a).

Statement of Jurisdiction.

The Eleventh Circuit panel decision sought to be reviewed was entered June 22, 2020, *Donald Grochowski, Estate Administrator, et al., v. Clayton County, et al.*, Eleventh Cir. No. 18-14567. (App. 1a -23a). This Court's March 19, 2020, Order extended the petition filing period under Sup. Ct. R. Rule 13.1 from 90 to 150 days, making this petition for writ of certiorari due November 19, 2020. Sup. Ct. R. 13.1, 13.3, and 30. Jurisdiction to review a timely certiorari petition is under 28 U.S.C. § 1254(1). Rehearing was not sought.

Statement of Facts.

On July 31, 2012, local police arrested Brooks, 20, for theft by receiving stolen property (driving mother's vehicle without permission), false name, suspended license, and a seat belt violation and an active warrant from Bay County, FL. (Doc. 1-21 p. 12-13). On August 8, 2012, Grochowski, 57, came through customs in Atlanta which found an Illinois bench warrant for DUI and aggravated fleeing and he was arrested and sent to the Clayton County Jail. (Doc. 1-24 p. 13).

Once booked, both Brooks and Grochowski were processed through a medical screening by the private medical provider Correcthealth, and a security classification screening. The challenged conditions and systems are addressed after the injury caused by exposure to the challenged substantial risk of harms.

A. Brooks wants Grochowski's candy and undetected by guards a fight results in Brooks killing Grochowski.

On August 14, 2012, while Grochowski and Brooks were in night time lock down behind the closed cell door (Doc. 1-21 p. 7-8, door picture) that prevented guard observation. (See text below p. 12-18 discussing in-cell observation problems). Brooks, who had a record of two misdemeanor assaults[1] that were deliberately ignored by the jail supervisors' screening/

[1] One assault involved a cellmate in a nearby county jail in May 2012. (Doc. 1-21 p. 54 NCIC record in Clayton County's possession 2012; Doc. 150-4 Henry County Records obtained in discovery 2018).

Plaintiff's case does not depend on whether Brooks would have revealed the in-cell assault during a face-to-face interview, with access to the criminal record, rather the issue is the substantial risk posed by his record of assaults that was systemically ignored in the screening/classification/ housing process to make the housing decision purely because there was an opening in a cell in this jail in which when the cell doors are closed the tower guard cannot meaningfully see in, and looming or ongoing fights obviously will be undetected.

Defense expert Sweeney states that housing unit correctional officers do not or should not have access to the criminal history of the detainee population. Berg says this is not true:

classification/ housing system as discussed below, assaulted Grochowski over a Reese's. (Doc.149-9 Waites Dep. p. 7-20 (discussing report, Doc. 1-20 p. 3-13; Doc. 150-1 p. 5). Brooks told officers that Grochowski had a package of Reese's peanut butter cups and that he wanted one of the two cups:

> The offender stated the victim was on the top bunk, and he was on the bottom bunk. The offender stated the victim gave him one of the peanut butter cups. After the offender ate half of his peanut butter cup he stated to me the victim jumped down and requested the offender give him the peanut butter cup back. The offender stated he stood up and the victim took a swing at him with his left hand, the offender blocked the strike with his left hand. The offender later changed this story stating it was the victims right hand that was used in the attempted strike. Immediately after blocking the victims punch attempt the offender stated he struck the victim in the throat so hard that he hit his head on the wall next to him. The offender continued stating he then punched and kicked the victim in the face 6-8 times after he was on the ground. I asked the offender why, he stated it was self defense. I asked at what point the victim was no longer a threat, the offender stated after the second punch he was no longer a threat. He continued stating that after the victim was unconscious and did not present any threat he drug the victim to the toilet where he placed the victims face and head into the toilet so he could drowned him to make sure he was dead.
>
> When asked about what happened next "the wall is over here and the toilet is over there" the offender said "I guess it is because I yanked his happy ass over there and put his face in the toilet and tried to drown him" "because I didn't like him for trying to take the reeses cup from me". We asked the offender the following "what was the purpose of sticking his (the victim's) head in the toilet" the offender responded "so I could kill him" we asked why he stated "cause he pissed me off about the reeses cup" we asked "did it work" he stated "oh it worked" "the nigger wasn't moving". He continued stating "I never thought I would have to kill anyone over a reeses cup."

> If correctional staff have a certification for NCIC access, they can access all of the criminal history files. If correctional officers are not certified, they can get this information from someone that is certified. Classification and housing personnel have to have access to criminal history records in order to make housing decisions and as a basis to counter the manipulation by detainees' under self-reporting of prior violence. The classification process should include the opportunity of the classification officer to use the criminal history as a check on an detainee's denial of prior assaultive behavior, which additionally reflects on the ability to trust the detainee in other areas.

(Doc. 150-2 p. 12)

(Doc. 1-20 p. 7). There is a video of Brooks describing the assault to officer Waites and another, made shortly after the events. (Doc. 159, videos of Brooks interview and reenactment; Doc. 167-1, interview transcript; Doc. 167-2 reenactment).

After Brooks killed Grochowski, he "waited for 10-15 minutes before he got the attention of another detainee." (Doc. 149-9 p. 19). Detainee Lewis, was outside of his cell when the offender got his attention and told him, "I just killed this dude, man." (Doc. 1-20 p. 5). Lewis looked in the window and saw the victim "lifeless with his head dangling over the toilet." (*Id*.). Lewis reported the incident to Officer Smith, who was conducting pill call who eventually the tower guard which began the process of the investigation. (*Id.* p. 6, 19, 27).

B. Screening/classification/ housing process overseen by the jailer policymakers was systemically deliberately indifferent to risk posed by a record of assaults, that was ignored in housing decisions, and was deliberately indifferent to the conditions of double-celling in cells in which, when the door was closed, the tower guard could not meaningfully see looming and ongoing fights.

Once booked, the classification officer, Baker, classified the detainees as either "Medium" or "Maximum," based on their criminal history alone. (Doc. 154-1 Baker Dep. p. 7:1-4). If the record showed current or prior "Violent/Assaultive Felony" escape history, they were "Maximum" and given a red jumpsuit. (Doc. 144-1 Baker Dep. Ex. 1 clear copy of classification tree; Doc. 154-1 Baker Dep. p. 10:20-11:3; *Id*. p.14:18-23). Everyone else was "Medium" and given an orange jumpsuit. *(Id*.).[2] Baker scored Grochowski and Brooks as

[2] The County claims its classification system is based on the Northpointe model, Plaintiff's expert Berg states this is incorrect:

> Mr. Sweeney also states that the Clayton County system is patterned after the Northpointe design. These opinions are not accurate. Both the NIC Objective Jail Classification guide and Northpointe's are detailed and comprehensive, but Clayton County's was not. The pertinent considerations, such as Brooks' youth, his history of misdemeanor assaults, and the answers or demeanor he would have

"Medium." (Doc. 154-1 Baker Dep. 14, 19-20; Doc.144-2; Doc.144-3; Doc. 144-1 clear classification tree).

Baker would have seen that Grochowski had no assault record (Doc.1-20 Grochowski's record), but she would also have seen Brooks had a record for assaults. On February 11, 2009, Spalding County arrested Brooks for misdemeanor affray (fighting), and he was found guilty. (Doc. 1-21 p. 53). On January 3, 2012, Brooks was arrested for defrauding an innkeeper. (*Id.* p. 57). On January 12, 2012, in Florida, Brooks was arrested for felony unarmed burglary and misdemeanor obstruction without violence and was found guilty of obstruction. (*Id.*). On May 29, 2012, Brooks was charged by Henry County, Georgia for misdemeanor affray (fighting), which was dismissed June 6, 2012. (*Id.* p. 54).

The screening/classification/housing process in this jail had to consider the substantial risk caused by the conditions of the jail that tower guard could not see into the cells[3] and therefore could not detect nor prevent looming or ongoing fights, where it is obvious that

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presented during a face to face interview was available to Clayton County, but they chose not use it.

(Doc. 150-2 Berg Rebuttal p. 9).

The Northpointe classification form which listed as "high risk flags:" "assaultive" and "mental," (Doc. 144-1), which when construed in Plaintiff's favor indicates that a housing decision should have accommodated Brooks' history of assaults. (*Id*.).

[3] Officers cannot "see in a cell from the control tower," (Doc. 149-7 Tuggle Dep. p. 23:24-24:6, a fact confirmed by multiple officers. (Doc. 152-1 Love Dep. p. 12:4; Doc. 151-1 T. Smith Dep. p. 19:24-20:21; Doc. 157-1 Sowell p. 11-12). Between the guard in the control tower and a detainee in his or her cell, there are three solid barriers, a closed front door, a pod section wall bordered by the sally port, and a wall around the guard tower all between the guard and the interior of the cell. (Doc. 146-2 Housing Unit Schematic). To see in a cell the correctional officer would have to be standing in front of the cell. (Doc. 146-1 Johnson Dep. p. 14:17-23;

To see in a cell "the correctional officer would have to be right up near the door and then peering to the side from the small window left and right." (Doc. 146-1 Johnson Dep. p. 14:17-23; Doc. 151-1 T. Smith Dep. p. 12:15-13:10).). Tameika Smith confirmed you have to be within an "arm's length" to see in the whole cell. (Doc. 151-1 T. Smith Dep. p. 12:15-13:10).

detainees fight.[4] Double-celling a detainee with an assault record increases the risk of a fight in these double cells in which there is a substantial and obvious risk that a looming or ongoing fight would not be detected for substantial periods of time when the cell doors were closed creating a substantial risk of harm where serious injury can result in any fight.[5]

The final housing decision was based solely on an opening in one of the double cells, where the screening/classification/housing system ignores a record of prior assaults. Housing officer McKibbons put Brooks in the cell with Grochowski because they both had Medium jumpsuits and there was an opening. (Doc. 149-4 McKibbons Dep. p. 5-6, 12-13). "I only put [Brooks] in [with Grochowski]," he said, "because it was space available at the time and that's it. It was no specific preference, no specific reason why… it just happened to have been in there at that particular time that space was available." (*Id.* p. 6:4-9). So, when the record is correctly constructed, the system of screening/ classification/ housing of which these jail supervisors would have been aware, housed detainees in these double cells with indifference to a record of prior assaults, where guards cannot see into the cells for substantial periods of time and therefore

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[4] It is obvious detainees fight (Doc. 149-7 Tuggle Dep. p. 24:7-14; Doc. 157-1 Sowell Dep. p. 12:9-12; Doc. 151-1 S. Smith Dep. p. 18:21-23).

It is obvious that assaults can lead to serious/ grave injury. (Doc. 156-1 Sowell Dep. p. 12:13-15("obvious" that "a person can get hurt pretty seriously in a fight"); Doc. 138-9 Cash Dep. p. 8:5-10 ("as a result of detainee in-cell fights, one or both people can be seriously injured ... in a short amount of time"); Doc. 153-1 Sweeney Dep. p. 142:6-11 ("when a fight starts serious injury can result to either party" and "[i]t can happen quickly ... [in] two, three minutes"); Doc. 148-1 Kimbrough Dep. p. 19:14-20 ("in any fight serious injury can occur"); Doc. 156-1 Southerland Dep. I p. 7:7-10 ("an in-cell fight can result in serious injuries to a detainee"); Doc. 146-1 Johnson Dep. p. 22:25-23:7 ("somebody sometimes is severely injured").

[5] It is obvious that an officer who cannot see into the cell cannot respond to an in-cell problem. (Doc. 149-7 Tuggle Dep. p. 24:7-14 ("[O]bvious" that detainees will get into fights if allowed); Doc. 157-1 Sowell Dep. p.12:9-12; Doc. 149-6 S. Smith Dep. p. 18:21-23). Officer K. Brown says that when and an in-cell fight occurs, an officer "wouldn't know [about it] unless somebody said something." (Doc. 149-1 Brown Dep. p. 28). Therefore, it is obvious from the design of this jail that when the cell doors are closed, the control tower cannot see looming or ongoing fights.

cannot detect fights, adding to the substantial risk from fights, that are foreseeable between detainees.

Classification occurs without any face-to-face interaction with the detainee. (Doc. 154-1 Baker Dep. p. 6-7; Doc. 149-2 Hewitt Dep. p. 7:9-19; Doc. 148-1 Sheriff Kimbrough Dep. p. 25; Doc. 153-1 Expert Sweeney Dep. p. 114:7-13).

Baker confirmed that the classification clerk had nothing to do with housing or cell assignments (Doc. 154-1 Baker Dep p. 15:17-22), where classification is done upstairs and the criminal history relied upon is not shared with the housing officer who makes cell assignments (*Id.* p. 16-17). This means that the challenged system of screening/classification/ housing did not consider individualized records of assaultive behavior in making the final housing placement.

The jail supervisors knew as a matter of clear law that assaultive tendencies were something that should be considered in making housing assignments.[6] The form that the jail policy makers relied upon for their "Maximum/ Medium" classification, put them on notice that there should be some individualized assessment for factors that increase the risk of assault in housing assignments. Listed on the form as "high risk flags" are factors such as "assaultive" and

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[6] See App. 43a (District Court Op. p. 20, "[J]ail administrators must consider an detainee's capacity for violence during the classification process ... ."); See also *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1029 (11th Cir. 2001) (failure to separate non-violent detainees from violent detainees); *Jones v. Diamond,* 594 F.2d 997, 1019, 1016 (5th Cir. 1979) (should be a classification "policy which protects pretrial detainees from violent, disturbed, and contagiously ill individuals as far as reasonably possible.").

As argued in the reason to grant certiorari no. 4, under *Kingsley*, high-ranking jail supervisors should make decisions that are objectively reasonable and the jury should be allowed to infer from the systems they oversaw that it was not objectively reasonable to have a screening/ classification/ housing system that ignored a record of assaults in making double celling assignments in this jail.

"mental."[7] (Doc. 144-1). When construed in Plaintiff's favor this indicates that a housing decision should have accommodated Brooks' history of assaults.

The County claims its classification system is based on the Northpointe model, Plaintiff's expert Berg states this is incorrect, because the Northpointe model is detailed and comprehensive, and includes age, criminal history, and interview responses. (Doc. 150-2 p. 36). Clayton County supervisors chose not to do face-to-face interviews with the criminal history. (*Id*.)

C. The jail supervisors have created the system whereby no individual officer ever makes a decision about the individual assaultiveness of a detainee before making the housing assignment, therefore they have established a permanent defense to deliberate indifference of assaultiveness of any housing assignment where a detainee has a record of assaults and by the system no individual officer ever confronts that objective fact on the record or a subjective assessment of the detainee with the record prior to the housing assignment.

The only face-to-face interview was by medical, who had no access to the objective criminal record, under the policies and practices of the jail supervisors. (Doc. 137-2. Pendersen

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[7] The screening/classification/ housing system also prevents the medical provider from sharing medical, or any, information with correctional staff who make housing assignments, asserting HIPPA as the grounds, notwithstanding that as a matter of law, that HIPPA has law enforcement exception. 45 C.F.R. § 164.512 (k)(5)). HIPAA allows correctional facilities to obtain or use protected health information for the safety of detainees and officers and the administration and maintenance of the safety, security and good order on premises of the facility. (*Id.*).

Similarly, though, and contributing to and showing the deliberate indifference to the record of assaults, likewise medical is prohibited from use of the criminal record. Both jail security experts agreed that no effective security assessment can occur without access to the criminal record, because detainees' self-report cannot be trusted. (Doc. 153-1 Sweeny Dep. p. 10:17-11:4; Doc. 150-2 Berg Rebuttal p. 12).

The mental health evaluation of Brooks asked about prior mental health treatment, but Brooks self-report denied any prior mental health treatment (Doc. 137-2 Pendersen Dec. p. 6), even though discovery revealed that Brooks had in fact had formal mental health treatment (Doc. 168-1 sealed record of Dr. Trivedi.).

A face to face interview with Brooks' criminal record might have yielded disclosure of the mental health treatment that was not revealed in the medial screening.

Dec.p. 5). Brooks initial medical and mental screening was done on August 1, during which he denied any history of violent behavior. (*Id.* p. 6).

NCCHC best practices require interviewing the detainee about their criminal history and objectively screen their attitude for "evasiveness" or "guardedness." (*Id*. p. 4, 5, 7). Without access to his criminal record, the nurse had no way of checking Brooks "evasiveness" or "guardedness" when he "denied any history of violent behavior." (*Id*. p. 4, 5, 7). Defendants' expert agrees that to be valid a review of the criminal record for screening purposes cannot rely solely on the detainee's self-report. (Doc. 153-1 Sweeny Dep. p. 10:17-11:4).

If a face-to-face interview had been held with Brooks, questions could have been asked about the circumstances of the 2009 arrest for misdemeanor battery resulting in an "affray (fighting)" conviction. (Doc. 1-21 p. 53-54). A face-to-face also would have allowed officers to inquire about the circumstances s surrounding his "affray" with a cell mate at the Henry County Jail three months before assaulting Grochowski . (Doc. 150-2 Berg Rebuttal Rep. p. 9).

In May 2012, while in Henry County Georgia Jail Brooks was charged with "affray (fighting)," after getting into a fight with his cellmate. (Doc. 1-21 p. 53-54; Doc. 154-1 Baker Dep. p. 53-54). According to records from Henry County, Brooks and his cellmate got into an argument over Brooks not respecting Johnson's in-cell time. (Doc. 150-4 Henry County Rep. p. 1-10). Brooks spit in Johnson's face, leading to a fight, and the fight investigation reflected that Brooks was "throwed off." (*Id*.)

1. Housing decisions also disregard record of assaults.

After detainees are assigned a color, a housing unit. officer can assign them to live with anyone else wearing that color. (*Id.* p. 18, 20-21; Doc. 155-1 Cash Dep. p. 20; Doc. 149-4 McKibbons Dep. p. 5:18-6:22). Not even housing assignments consider or assess suitability for

double celling, as, "[t]here is no specific order or specific treatment as far as to why someone is paired, because there are guys that are charged with murder and robbery and high felonies that are actually housed together." (Doc. 149-4 McKibbons Dep. p. 7: 16-25).

On August 3, 2012, at 11:01 p.m., Officer Brown assigned Brooks to Unit Six, cell 209B. (Doc. 149-1 K. Brown Dep. p. 18: 9-19). Brown did not review any screening or criminal record before his decision: "It's random. Its whatever room is open, wherever there is space." (*Id.* p. 20:15-23). Oddly, at 4:24 a.m. on August 11, Officer McKibbons moved Brooks into Grochowski's cell, again without reviewing Brooks medical screening/intake report, or his criminal assault record. (*Id.* p. 19:4-10; Doc. 149-4 McKibbons Dep. p. 8-9). "I only put [Brooks] in [with Grochowski]," he said, "because it was space available at the time and that's it. It was no specific preference, no specific reason ... .." (*Id.* p. 5-6, 12-13).

Berg watched the video of Brooks' post-incident interview with Officer Waites and concluded Brooks was not a suitable candidate for double-celling. (Doc. 150-1 Berg Report p. 2, 8; Doc. 159 CD of interviews).

2. Medical Intake Screening

Correcthealth nurses performed a medical intake screening of each detainee. (Doc. 137-2 Pendersen Dec. p. 3-4). NCCHC best practices require interviewing the detainee about their criminal history and objectively screen their attitude for "evasiveness" or "guardedness." (*Id*. p. 4, 5, 7). Yet, the Correcthealth nurses who performed screenings, by policy and custom of the jail superiors, did not have access to the objective criminal record. (*Id.* p. 5).

In Brooks' initial medical and mental screening of August 1, he denied any history of violent behavior. (*Id*. p. 6). Without access to his criminal record, the nurse had no way of checking Brooks "evasiveness" or "guardedness" when he "denied any history of violent

behavior." (*Id*. p. 4, 5, 7). Defendants' expert agrees that to be a valid screening review violent criminal behavior, one cannot rely solely on the detainee's self-report (Doc. 153-1 Sweeny Dep. p. 10:17-11:4), where the medical screening is done without access to the criminal record. (Doc. 137-2 Pendersen Dec. p. 5).

The policy prohibited medical from providing any medical or mental health information to the correctional officers, asserting HIPPA as the basis. (Doc. 149-2 Hewitt Dep. p. 9; Doc. 162 p. 13, no. 36 DFF Resp. SMOF). There is a specific statutory exception in HIPPA for law enforcement purposes.[8] Plaintiff's expert testified that corrections officials must have access to medical information to protect the safety of other detainees (Doc. 150-2 Beg Rebuttal Rep. p. 11).[9]

D. Facts Showing That The Challenged Jail And Door Design Of The Multi-Celled Housing Units, And Underfunding- Understaffing Were Conditions Of Confinement creating a condition of substantial risk of harm caused by inability of guards to have line of sight or sound connection inside cell.

The evidence, when appropriately construed, supports the conclusion that the door design, in combination with the fact that the guard tower is seventy plus feet from the cells, prevents the central guard from seeing in the cell, preventing meaningful detection and intervention in fights and this substantial risk was not offset by video, or more frequent rounds.

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[8] HIPAA allows correctional facilities "to obtain or use protected health information if necessary for providing health care to an detainee ... including law enforcement on the premises of the facility, and the administration and maintenance of the safety, security and good order of the correctional institution." 45 C.F.R. § 164.512 (k)(5).

[9] Although the County argued that the medical intake satisfied their duty to interview an detainee relative to housing determinations, by their policy, the medical intake screening information was not shared with classification or housing officers (Doc. 149-2 Hewitt Dep. p. 9:11-10:1), and neither the classification officer nor the housing officer who made jail assignments regularly interviewed detainee's classification or housing purposes. (Doc. 154-1 Baker Dep. p. 7; Doc. 149-4 McKibbons p. 31).

The Eleventh Circuit's discussion of the medical screening is at 4a. The District Court's discussion of the medical screening is at 25a-26a.

The schematic of a floor or housing unit of the jail in the appendix shows one of the jail's octagon-shaped housing units, with a control tower in the center. (App. 59a).[10]

Each cell door is about "70 to 80 feet" from the control tower. (Doc. 149-3 p. 12: 11-15.4). The cells, rather than open barred doors, have "closed front doors," (Doc. 156-1 Southerland Dep. p. 8:2-5), and a "small window" at most about six inches wide. (Doc.146-1 Johnson Dep. p. 10:9-11; Doc.149-6 S. Smith Dep. p. 10:13-16; Doc. 1-21 p. 7-8 (picture of cell door)); Doc.146-2,1; Jail Photos.[1]

Officers cannot "see in a cell from the control tower," (Doc. 149-7 Tuggle Dep. p. 23:24-24:6, a fact confirmed by multiple officers. (Doc. 152-1 Love Dep. p. 12:4; Doc. 151-1 T. Smith Dep. p. 19:24-20:21; Doc. 157-1 Sowell p. 11-12). Between the guard in the control tower and a detainee in his or her cell, there are three solid barriers, a closed front door, a pod section wall bordered by the sally port, and a wall around the guard tower all between the guard and the interior of the cell. (Doc. 146-2 Housing Unit Schematic).[11] To see in a cell the correctional officer would have to be standing in front of the cell, at arm's length, and then peering to the side

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[10] Each floor has six-pie shaped housing pods. (*Id.*). Each housing pod has two tiers of eight cells, for a total of 96 cells per floor or housing unit. (Doc. 149-3 Lee Dep. p. 11). There is a separate doorway into each pod from the "sally port" surrounding the tower. (App. 59a). Each pod has an open area with daybreak tables, behind which the 16 cells line the outer wall of the pod. (*Id.)*

[11] Under seal in the distinct court of record are sealed photos that would give the court an idea of the view of the cells form the guard tower. (Doc. 140 - 140-6). Undisputedly each of the eight housing units is designed in the same way.

325 Outside of tower, sally port (floor between tower and pods) pods and cells
291 Inside of guard tower and to pod to cells
292 Inside tower to sally port to pod wall and doors of the two tiers of cells
295 Inside tower to sally port to pod wall and doors of the two tiers of cells
323 Back of sally port to guard tower to pod walls to cell doors
345 Inside sec. 2, Housing Unit 1, showing cell 2-10, (like HU 6, cell 2-10) cell_block_panorama Pod through dayroom to cells in upper and lower tiers.

from the small window left and right," to see in the whole cell. (Doc. 151-1 T. Smith Dep. p. 12:15-13:10; Doc. 146-1 Johnson Dep. p. 14:17-23).

None of the cells have video or audio surveillance. (Doc. 150-1 p. 8 ("more likely than not that changing cell doors to include large glazing or passage of sound, or using video or audio technology, to eliminate the obstacles to observation into cells by correctional officers…. Would have alleviate the risk of in-cell assault."); Doc. 150-1 p. 10 ("electronic monitoring (cameras) are commonly used throughout jail facilities and have been for used…. [p]rivacy concerns have long been addressed regarding the use of those cameras in those areas….. security and safety concerns come first.")). Video feed of the cell or clear glazing on the doors would give the guard tower visibility into each cell. (Doc. 150-2 Berg Rebuttal Rep. p. 9-10).[12]

In each cell there is a buzzer or call-button but it does not allow the control tower guard to hear into the cell, (Doc. 146-1 Johnson Dep. p. 22:21-24). There was one handicapped cell per section that had an intercom allowing the control tower guard to hear into the cell when activated. (*Id.* p. 22:5-18). As reflected in *Goodman v. Kimbrough,* 718 F.3d 1325, 1329 (11th

[12] Sweeney states that window glazing was adequate and industry-standard. (*Id*.) Berg asserts that glazing standard determinations should be based on a continuous line of sight, which did not exist in Clayton County Jail, because visual monitoring from the control center was impossible. (*Id*.). Therefore, continuous observation by roving staff was necessary. (*Id*.).

Although Defendants argue that detainees' privacy justifies the challenged jail design preventing visibility into cells, Plaintiffs' expert Michael Berg states that "[w]hile privacy concerns are important, they do no[t] supersede safety and security." (Doc. 150-2 Berg. Rebuttal Rep. p. 10). Applicable Georgia Jail standards require guards to be able to observe detainee living areas or be contacted by detainees at all times. The 2008 Georgia Jail Standard, §23.17, (Doc. 153-3, Sweeney Dep. Ex. 27): "Facility control posts shall be located in or immediately adjacent to detainee living areas to permit officers to hear and respond promptly to calls for help." Similarly, "Detainees shall be able to contact detention staff at all times." *Id*. at § 23.22).

Cir. 2013), they are not effective at notifying guards of fights.[13] There is no evidence that the call button did anything to stop or slow the fight or prevent the death of Grochowski.

It is obvious that an officer who cannot see into the cell cannot respond to an in-cell problem.. Officer K. Brown says that when and an in-cell fight occurs, an officer "wouldn't know [about it] unless somebody said something." (Doc. 149-1 Brown Dep. p. 28). (Doc. 149-7 Tuggle Dep. p. 24:7-14). Therefore, it is obvious from the design of this jail that when the cell doors are closed, the control tower cannot see looming or ongoing fights.

It is obvious that if allowed detainees will get into fights. ("[O]bvious" that detainees will get into fights if allowed); Doc. 157-1 Sowell Dep. p.12:9-12; Doc. 149-6 S. Smith Dep. p. 18:21-23).

Double-celling within the challenged jail design and understaffing prevents the opportunity for continuous observation and creates unsafe conditions. Doc. 150-1 Berg Expert Report at 7,10; Doc. 158-2 Berg Dep. at 75:2-24). Detainees were locked in their cells from evening through the morning each day. (Doc. 1-20 p. 16 (post-incident investigation statement, that during the incident "we were in lockdown as usual"); Doc. 151-1 T. Smith Dep. p. 29:6-7

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[13] The County was previously sued in 2010 for a 2008 in-cell assault; that went unseen throughout the night, by a detainee placed in "administrative segregation ... out of concern for their own safety or the safety of others," against an elderly man, with whom he was celled without regard to the risk of assault. *Goodman v. Kimbrough*, 718 F.3d 1325, 1329 (11th Cir. 2013); N.D. Ga. No. 1:10-cv-03066-AT. Goodman's injuries required treatment in the "intensive care unit ... for seven days, and ... two to three weeks in the Jail infirmary." *Goodman*, 718 F.3d at 1330. The Complaint alleged and Defendants admitted:

> No changes were made to Jail policies in response to the assault on Goodman, despite Defendant policymakers' actual notice that their policies of multi-celling, understaffing, and under-monitoring caused a serious cell-mate assault to occur, ... where serious injury can occur in a matter of the first few undetected blows.

(Doc. 73 Am. Compl. ¶42; Doc. 75 County's Answer at ¶42). Notice is also shown to Commissioners by the obviousness of the problems and risks created by design and underfunding

(when responding to the incident, Grochowski and Brooks' cell door was locked close)). Therefore, from that period, it is obvious that guards cannot see into the cells from the cell tower, except for the 2-3 seconds passing by during hourly rounds of the 96 cells, and if they notice something they can stop.

The practice for years through 2012 was to have two guards stationed in each housing unit, one in the control tower and one serving as a runner, (Doc. 146-1 Johnson Dep. p. 13:18-23; see also Doc. 1-20 p. 62 Daily Roster of 8/14/2012) and the long-term "policy" was for hourly rounds when detainees were in their cells. (Doc. 146-1 Johnson Dep. p. 13:24-14:16; see also Doc. 155-1 Cash Dep. p. 33 (round frequency policy has "been [in] place since we moved into the jail").

Plaintiff's expert testified there should be an additional one to two guards per housing unit to allow for nearly continuous rounds. (Doc. 150-1 Berg Expert Report p. 8). The Jail Design Guide, 3rd Edition (2011) (Sweeney Dep. Ex. 17), "Single Versus Multiple Occupancy" housing, sec. 4, ch. 27, p. 305-310, canvasses the pros and cons between building for single or multiple celling: "On balance ...security ... capabilities are compromised to attain the construction cost savings of multiple-occupancy settings. Once compromised these critical capabilities may be lost for the life of the jail, which could exact a toll on the jail staff and detainees." (Doc. 153-2 Jail Design Guide p. 308). These concerns were obvious to the County and Sheriff before building the current jail and they remain true today.

1. Obviousness of fights resulting in serious or grave injury

It is "obvious" that detainees will get into fights if allowed. (Doc. 149-7 Tuggle Dep. p. 24:7-14; Doc. 157-1 Sowell Dep. p. 12:9-12; Doc. 151-1 S. Smith Dep. p. 18:21-23).

It is obvious that assaults can lead to serious/grave injury.[14]

It is likely that when attacked in-cell, a detainee will "fight or flight" and will foreseeably respond with force. (Doc. 155-1 Cash Dep. p. 34:4-35:6; Doc. 150-1 Berg Expert Rep. p. 4, 7, 9).

2. Underfunding & understaffing leads to dangerous over bunking and security concerns

Even though the Sheriffs had known from staffing studies done in the late 1990's when the jail was built, that full staffing would require 250 corrections officers, the County only funded employment of 137 corrections officers as of 2012. (Doc. 184-3 Kimbrough Dep. Ex. 17 p. 2, Clayton Daily News, 2/10/12. The Sheriff's office had not received a significant increase in staff size since 2000. (Doc. 148-4 p. 1, Ex. 18 Kimbrough Dep., meeting with the commission 2/18/11).

On February 18, 2011, the Sheriff's office reported to the Commission that, "300 detainees at the Clayton County Jail have to sleep on cell floors, because one [housing] unit in the jail has been closed due to safety concerns because of understaffing at the facility. [Chief Deputy Watkins] said there are currently 1,900 detainees in the jail, compared to 1,100 detainees in 2002." (Doc. 148-4 p. 2).

Although the jail could hold up to 1,920 detainees, the facility was designed, "to accommodate security level" such that "some housing units are single bunked for more troublesome detainees, giving the facility an ideal capacity of 1,544 beds." (Doc. 148-2 Jail Operations, Clayton County Government, p. 1). On February 10, 2012, Sheriff Kimbrough asked

[14] (Doc. 156-1 Sowell Dep. p. 12:13-15; Doc. 138-9 Cash Dep. p. 8:5-10 ("as a result of detainee in-cell fights, one or both people can be seriously injured ... in a short amount of time"); Doc. 153-1 Sweeney Dep. p. 142:6-11; Doc. 148-1 Kimbrough Dep. p. 19:14-20; Doc. 156-1 Southerland Dep. I p. 7:7-10 Doc. 146-1 Johnson Dep. p. 22:25-23:7 ("somebody sometimes is severely injured").

the Commission for additional funding because he had to close a full housing unit of 96 cells, causing "triple-bunk[ing]" in some cells (Doc. 148-3 p. 1). [15]

Kimbrough told the Commissioner that he would re-open the closed eighth housing pod, if his staffing request was granted. (*Id.* p. 1-2). He said the additional officers would take the staffing numbers to a "conservative" level of operating the facility, without having to incur overtime. (*Id*.)

The eighth housing pod remained closed through the August 2012 assault. (Doc. 1-20 p. 62 Jail Roster). This supports the inference that the availability of 96 more cells that could have been used for single celling more troublesome detainees like Brooks.

Because the overcrowding complained of in 2011 and 2012 prevented corrections officers from single-bunking "more troublesome detainees," Officer McKibbons who placed Brooks in Grochowski's cell considered nothing more than vacancy when doing so. "I only put [Brooks] in [with Grochowski] because it was space available at the time and that's it. It was no specific preference, no specific reason why… it just happened to have been in there at that particular time that space was available." (Doc.149-4 McKibbons Dep. p. 5-6, 12-13).

Between 2010 and 2012 there were at least 115 in-cell assaults, accounting for 35-40% of the total assaults in the facility. (Docs. 147, 147-1). Defendant's expert stated that the jail he previously ran had a 15% in-cell assault rate, and he admitted that a 35% rate is "high." (Doc. 153-1 Sweeney Dep. at 135). This statistic is contested, and is based on counsel's examination of 620 pages of discipline reports comparing in-cell versus out of cell assaults, free for review by jail supervisors, and is evidence that can be considered with the other evidence, that the failure of

[15] Panel erroneously found that the County did not have to resort to triple bunking due to overcrowding. App 8a, 21a.

jail supervisors to produce their own statistics, shows that that they either did not create statistics helpful to a jail supervisor or did not provide theirs for what they would show.

Statement of District Court Jurisdiction

The district court had jurisdiction to hear Plaintiff's claim under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1443 (civil rights).

Reasons Certiorari Should be Granted.

1. Certiorari is sought to reverse summary judgment because the decisions leave in place the challenged conditions and system at the Clayton County jail, giving judicial blessing to a system that immunizes the line officer making the actual housing decision, by withholding from the housing officer the record of assaults, who makes the housing assignment on cell availability only; in this jail in which double-celled detainees spend considerable time behind locked cell doors, and the control tower guards cannot detect looming or ongoing fights.[16]

There was evidence to support the conclusion the conditions and systems subjected Grochowski to a substantial risk of harm, that was recklessly operated with disregard to obvious problems by failed supervision, which could support a finding of reckless indifference against the jail supervisors. (App. 13a-22a).

Nonetheless, the panel applied an objective and objective test. (App. 13a.) The panel rejected the evidence challenging the failure to recognize Brooks' violent propensities by the misdemeanor assaults which would have driven separate celling or a housing situations where he could be monitored more closely by finding that "Plaintiffs have failed to show however, that the Constitution requires in person security screenings or consideration or violent misdemeanors." (App. 15a).

The panel tried to convert the medical intake in an adequate face-to-face interview, (App. 16a) which as described above, is challenged because medical did not have access to the criminal record to discount self-reports of non-violence, where Brooks reported no violence to medical, and where medical conveyed no information to corrections officials erroneously relying on

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[16] On summary judgment this Court may examine the record de novo without relying on the lower courts' understanding. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). All reasonable inferences are drawn in Grochowski's favor. *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S.Ct. 1861, 1863, 188 L.Ed. 895, 897 (2014).

HIPPA. (See above p. 12, 19). The panel mentioned the initial classification into Medium and Maximum and then concluded "Plaintiffs have simply failed to show the jail's classification system does not adequately consider an inmate's capacity for violence." (App. 17a).

The panel re-characterized the condition of a substantial risk of harm caused by double-celling Brooks, in particular with his record of assaults, or any detainee in a cell in which when the cell door was closed there would be no meaningful observation to detect looming and ongoing fights, by shifting Plaintiff's strong evidence on this point from Berg's expert testimony, and available standards as if the sole remedy were continuous rounds. (App. 17a – 18a). The panel concluded "still, we think these cases support our conclusion here that the jail's practice of conducting hourly rounds is constitutionally adequate." (App. 18a). The panel relied on two Eleventh Circuit cases ignoring the expert evidence (Doc. 1-17 (Berg Dec.); Doc. 150-1 (Berg Report); Doc 150-2 (Berg Rebuttal); Doc. 158-1 through 158-4 (Berg Dep.)) and testimony and admissions by jailers about the obvious fact that the guards cannot see in when the cell door was closed.

The panel noted it need not address the subjective component for the individual jail supervisors because "Plaintiffs failed to show the challenged conditions posed a substantial risk of serious harm." (App. 18a n.8).

The panel did not address qualified immunity because it found no right was violated. (App. 18a n. 9).

As to the County, Plaintiff challenged the jail and cell door design which prevented the central tower guard from being able to meaningfully observe looing and ongoing fights when cell doors were closed, and they were closed for substantial periods of time. (Appellant's Opening Brief) Plaintiff also challenged the County's prolonged underfunding which adversely impacted

staff size which impacted frequency of rounds and which impacted the ability to see an eighth 96-cell housing unit opened,

The panel said there was no evidence that Brooks would have bene housed in a single cell in the dormant housing unit (App. 8a-9a). If the jail were to have followed screening/classification/housing procedures that were not deliberately indifferent to known obvious risks, this evidence sup[ports the conclusion that a housing decision would have been made to single-cell Brooks. Plaintiff's evidence from expert Berg on these points, reporting inferences the jury could draw, is addressed below in the summary of Berg's Declaration filed with the Complaint, to show just how dangerous Clayton County Jail's systems were, where apparently the Defendants learned nothing from *Goodman v. Kimbrough,* 718 F.3d 1325, 1329 (11th Cir. 2013), which according to Berg, gave them notice of serious security deficiencies connected to double-celling persons with risk factors who should not have been double-celled and inability to have meaningful guard observation in cells and an apparent custom in which their security system to mitigate the lack of guard observation in cells, the buzzer system, was routinely turned off. The *Goodman* case is notice to management that there was a practice of disabling the emergency call buttons, which reflects a failure of a safety system of cell monitoring that led to the death of Grochowski. (*Id*. p. 13 & 14 ¶ 34).

Further, in spite of the expert evidence about the dangerous conditions, *Goodman* is used as a legal foil to say as a matter of law the classification and housing system and the jail design issues are beyond the reach of evidence in response to Plaintiff's motion for partial summary judgment about the conditions and systems resulting in this cell assignment of a detainee with a record of assaults in a cell in which the guard could not see when the cell door was closed, the Defendants argued the following,

> Further responding, this paragraph is contrary to the holding in *Goodman*, wherein the Eleventh Circuit held that "Goodman cannot claim that an official action or policy of the Sheriff's Department caused his injury" and there was not a "custom, so settled and permanent as to have the force of law, that ultimately resulted in deliberate indifference to a substantial risk of serious harm to Goodman." *Goodman v. Kimbrough*, 718 F.3d 1325, 1336 (11th Cir. 2013).

(Doc. 162 p. 8 para 22).

The trial court in *Goodman* relied on a standard that there must be strong evidence of an imminent risk of assault for officers to be liable. (*Goodman*, Case No. 1:10-cv-03066-AT, Doc. 71 p. 15) Notwithstanding evidence that the officers admitted that Raspberry the aggressor was in the special management unit and detainees housed there were considered to demonstrate violent tendencies (*Id*. p. 12), and ordinarily would have been single celled "due to security concerns about whether they could behave," meaning there was a substantial and known risk of fights or violence. (*Id.*). Even though the officers were working with special management unit detainees and therefore would be expected to know of their violent propensities the court discounted that knowledge because they did not know the specific individuals involved. (*Id.* p. 15). *Marsh v. Arn*, 937 F.2d 1056, 1062 (6th Cir. 1991) ("Failure to segregate violent inmates from non-violent inmates" is objectively severe "where there is a 'pervasive' risk of harm or where the victim belonged to an 'identifiable' group of prisoners for whom risk of assault is a serious problem of substantial dimension."). The special management unit detainees in *Goodman* presented a risk of assault. Goodman, 67 and suffering from dementia, was severely beaten by his cellmate throughout the night undetected, where detainees in a special management unit present a special risk of violence. (2013 U.S. App. LEXIS 12740 at *1329). The courts noted "ordinarily" they would be single-celled. (*Id.* at *1329; Case No. 1:10-cv-03066-AT, Doc. 71 p. 4). The assault of Goodman occurred in 2008 and by then Tuggle, was complaining about under-funding and understaffing in letters to the commission. (Doc. 149-8 Tuggle Dep. Ex. 17).

Grochowski's claim against the County, on one hand, was one of joint causation connected to the jail and cell door design condition, which was a considered choice at the time of construction which led to the central tower guard being unable to see in the cell when the door was closed creating a condition of substantial risk of harm of undetected fights, which could only have been mitigated by other brick and mortar issues like adding video or microphone or sufficient funding to increase risk or always have full use of all housing units of the jail to accommodate the anticipate percentage of detainees who needed to be single celled. The other claim against the County was for underfunding which led to understaffing which led to the closing of the 96-cell housing unit as addressed above in p. 17-19

The Panel once again boiled down Plaintiff's evidence and position and re-characterized it saying "Plaintiff's position amounts to an argument that the constitution requires constant observation of double-celled inmates." (App. 20a). Plaintiff's position is discussed in the paragraph above. Berg's position is that the potential for incidents in sleeping cells is always much higher, and this cell only allowed observation if standing at the door, where Brooks should have been housed where he could always be observed. (Doc. 1-17 p. 14 4 ¶ 35). The placement in this cell allowed the unobserved killing. (*Id.*). The records showed no video or electronic monitoring, where adequate monitoring is a required condition of confinement, before making a housing decision that can result in failed observation resulting in grave or serious injury, which can happen between any two inmates, even of low security classification, because "appropriate classification can only moderate, but not eliminate, violence between two inmates housed in one cell." (*Id*. p. 14-15 ¶ 35).

Brooks' assault record meant that he should have been somewhere other than in a double-cell with Grochowski. The failure to classify Brooks, with a history of assaults, even if

misdemeanors, his youth, and Grochowski of advanced age, and placement in a two-person cell was extremely reckless and led to the death. (Doc. 1-17 p. 10 & 11). The failure to classify and separate by commonly accepted classification categories, like age, instant offense, criminal history, caused the killing. (*Id.* p. 12 ¶ 29). The intake and classification, security and housing assignment led to the death was outside acceptable practices, of the Georgia Sheriff Association, Jail Standards led directly to the operational shortcomings that led to the death. (*Id*. p. 10).

The 2008 Georgia Jail Standard, §23.17: "Facility control posts shall be located in or immediately adjacent to inmate living areas to permit officers to hear and respond promptly to calls for help." Similarly, "Inmates shall be able to contact detention staff at all times. An audio communication system which permits inmate contact shall be used to augment staff supervision when a staff person is not within normal hearing distance of the inmate." *Id*. at § 23.22. (Doc. 153-3 Sweeney Dep. Ex. 27, pp. 123 & p. 125). [17]

The panel without considering the combination of conditions and systems, makes the finding at App. 20a that national standards only require observation of cell fronts (App. 20a) as if to say the standards are indifferent to observation inside cells, which is construction of the evidence in favor of Defendants. Berg addressed the panel's position about glazing and doors (App. 20a) and indicated that safety and security must be the driving motivator. (App. 103a).

[17] See *Bass v. Pottawatomie Cty. Pub. Safety Ctr*., 425 F. App'x 713, 720 & n.2 (10th Cir. 2011) (finding entity liability and severity of harm from inmate-on-inmate assault in the absence of any priors because: "based on the evidence introduced at trial regarding the State of Oklahoma's Minimum Jail Standards and the Jail's own internal policies requiring close supervision of unclassified detainees, we believe the jury, relying on its own common sense and intuition, could reasonably infer that the Jail maintained a policy and/or custom that was deliberately indifferent to a substantial risk that commingled intoxicated detainees such as Mr. Bass would be assaulted and seriously injured.").

The panel then resorts to the emergency call buttons as a factor that eliminates risk from looming or ongoing fights. If a fight starts, the fight can escalate over access to the button. Further, the evidence from *Goodman* is that there was a custom of turning off these emergency buttons notwithstanding the fact they are called emergency button of help, emergencies or fights. The fight in our case went undetected and the sole source of evidence as to whether the emergency button was used or answered is the Defendants and obviously the emergency button did nothing to protect Grochowski, where Brooks should have bene housed in a single cell. (Doc. 1-17 para. 34).

The panel construed Plaintiff's arguments about lack of funding, which impacted staffing and the4 availability of single-celling and the panel brushed the evidence inside and the inferences that could be drawn therefrom, finding that "the constitution does not require continuous observation of double-celled inmates," (App. 21a) where once again, the challenged condition is considered in isolation of the other systems and conditions issues that caused the death. They stay staffing was adequate, despite evidence that full staffing would require 250 corrections officers, and the County only funded employment of 137 corrections officers as of 2012. (Doc. 184-3 Kimbrough Dep. Ex. 17 p. 2, Clayton Daily News, 2/10/12.). Also, in 2012, a 96-bed housing unit remained closed, where the overall jail design was meant to allow for single-celling of "more troublesome" detainees," which required access to the taxpayer funded housing unit lying fallow. (Doc. 148-2 Jail Operations, Clayton County Government, p. 1).

The panel also defended the disregard of the evidence about the 96 cell building used for single celling by finding "nor is there any evidence that ... the jail would have opted to single cell any inmates that ordinarily would have been double celled." (App. 21a). This of course is a position based on speculation of what the Defendants might have done, versus what the evidence

showing what should have been done according to their own policies and the constitutional practices asserted by Berg.

The Panel erroneously found that the County did not have to resort to triple bunking due to overcrowding (App 8a, 21a), despite evidence that on February 10, 2012, Sheriff Kimbrough asked the Commission for additional funding because he had to close a full housing unit of 96 cells, causing "triple-bunk[ing]" in some cells (Doc. 148-3 p. 1). The panel drew an ultimate conclusion in favor of Defendants that Plaintiffs "failed to show that the existing funding and staffing levels posed a substantial risk of serious harm." (App. 22a).

Grochowski's evidence is expert evidence about the actions and inactions of those who have created the challenged conditions and systems. The panel has weighed and credited the evidence in favor of the Defendants, in disregard of Plaintiff's expert testimony, and relying on such case law that points out violent propensities must be considered and meaningful observation provided lest conditions of substantial risk of harm are created individually or in combination. At no point did the panel or the district court ever fairly consider each condition of system in combination with others.

Case law has long held that violent propensities must be considered and obviously have to be considered in light of the setting in which the violent inmate is placed. See e.g. *Holt v. Sarver*, 442 F.2d 304, 308 (8th Cir. 1971) (relief obtainable before assault).

The screening/classification/housing system intentionally precludes notice of the objective evidence of assaults to the housing officer, and eliminates proof of subjective awareness of the existence of a record of assaults from the person who makes the final housing decision, leaving a claim based on the difficult *Farmer*-inference drawing-method from conditions of obvious risk as applied to the decisions of the jail supervisors. The final housing

decision according to the system is made in a manner that immunizes the person making that decision from subjective awareness of the assaultive tendences of the person he is assigning to a cell merely because there is an opening. The jail supervisors have created this system and have been deliberately indifferent to its results and its obvious consequences in the context of these cells in which when the door is closed, the guard cannot detect looming or ongoing fights.

The system and jail's housing availability as a condition, has a shortage of single cells, connected to a considered choice to let a housing unit of 96 cell lie fallow tied to County lack of funding, where administration of the jail, is controlled by these Defendant jail supervisors, who can make the changes sought, but they never see the detainee and probably know nothing about 99% of actual placement until after the fact, when something happens and records are, or could be reviewed. Berg indicates that documentation should be "collected to investigate incidents in which persons were injured, whether inmates or staff, or where there were security breaches," meaning security decisions that increased the risk of the incident caused. (Doc. 1-17 p. 4). The failure to classify Brooks, with a history of assaults, even if misdemeanors, his youth, and Grochowski of advanced age, and placement in a two-person cell was extremely reckless and led to the death. (*Id*. p. 10 & 11). The failure to classify and separate by commonly accepted classification categories, like age, instant offense, criminal history, caused the killing. (*Id*. p. 12 ¶ 29). The intake and classification, security and housing assignment led to the death was outside acceptable practices, of the Georgia Sheriff Association, Jail Standards led directly to the operational shortcomings that led to the death. (*Id*. p. 10).[18] The failure to be able to observe and

[18] See *Bass v. Pottawatomie Cty. Pub. Safety Ctr*., 425 F. App'x 713, 720 & n.2 (10th Cir. 2011) (finding entity liability and severity of harm from inmate-on-inmate assault in the absence of any priors because: "based on the evidence introduced at trial regarding the State of Oklahoma's Minimum Jail Standards and the Jail's own internal policies requiring close supervision of unclassified detainees, we believe the jury, relying on its own common sense and

intervene increased risk. (*Id*. p. 9.) The failure of jail supervisors and administrators to properly monitor and supervise institutional activities, staff performance, policy adherence, security and medical/mental health activities and inmate movement contributed directly to the death of Kenneth Grochowski. (*Id*. p. 13 ¶ 32). This failure is also reflective of deliberate indifference. *Id*. The *Goodman* case is notice to management that there was a practice of disabling the emergency call buttons, which reflects a failure of a safety system of cell monitoring that led to the death of Grochowski. (*Id*. p. 13 & 14 ¶ 34). The potential for incidents in sleeping cells is always much higher, and this cell only allowed observation if standing at the door, where Brooks should have been housed where he could always be observed. (*Id*. p. 14 ¶ 35). The placement in this cell allowed the unobserved killing. (*Id*). The records showed no video or electronic monitoring, where adequate monitoring is a required condition of confinement, before making a housing decision that can result in failed observation resulting in grave or serious injury, which can happen between any two inmates, even of low security classification, because "appropriate classification can only moderate, but not eliminate, violence between two inmates housed in one cell." (*Id*. p. 14-15 ¶ 35).

The Classification and Medical/Mental Health Units failed to ensure that inmates with known histories of violence and unpredictable behavior were kept separate from the rest of the inmate population. (*Id*. p. 14-15 ¶ 37). Jail supervisors failed to develop adequate polices or policies were not followed such that dangerous customs could have developed based on the egregiousness of this event, and the totality of systemic failures surrounding the obvious need to have effective in cell observation any time two inmates are housed in one cell and the cell can be

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intuition, could reasonably infer that the Jail maintained a policy and/or custom that was deliberately indifferent to a substantial risk that commingled intoxicated detainees such as Mr. Bass would be assaulted and seriously injured."

locked down for prolonged periods, and there is no observation where violence is always a possibility between any two inmates. (*Id*. p. 15-16 ¶ 38). Failure of Clayton County Georgia officials at all levels to effectively and efficiently address the staff shortages and overcrowding conditions found within the jail facility contributed to the circumstance/s that led to the murder of Kenneth Grochowski. (*Id.* p. 16 ¶ 39).

Berg predicted that unless change was made, then the reckless operation of the jail by line officers and supervisors is likely to lead to unacceptable events, like and similar to the unobserved and unstopped beating of Kenneth Grochowski by William Brooks, when two inmates are similarly misclassified, housed in one cell, and are likewise unobserved, when violence is imminent and unstopped. (*Id*.).

If certiorari is not granted other jails will duplicate the screening/ classification/ housing system that insulates the person making the final housing decision, while ignoring an objective record of assaultive behavior because the system withholds that information critical to a safe housing assignment. The jury should be allowed to determine whether the combination of the conditions and systems created a substantial risk of harm and then be allowed to draw inferences from the obvious conditions and systems of which the jail superiors had knowledge because of their control over those conditions and systems.

2. Certiorari should be granted to address whether in this conditions case an objective standard of liability should be applied without having to prove deliberate indifference traveling under a standard of objective reasonableness where *Bell* proposed an objective standard in conditions cases, *Kingsley* suggests an objective reasonableness standard in conditions cases and at least three circuits have applied an objective reasonableness standard.

This is a jail conditions case, where the jail supervisors and the defendant County are to supervise and control those who operate the jail's conditions and systems in a manner that does not cause deprivations of constitutional rights. Their acts and refusals to act of supervision, and creation of conditions, are usually done as matters of administration safe from the front-line, as a matter of deliberate consideration. Their decisions have long term consequences in the creation of the conditions and systems the will impact the daily lives of the detainees and the staff and those decisions should be reachable as a matter of objective reasonableness to fulfill the intent of section 1983 and protect the rights of detainees from punishment that is only possible postconviction. In *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996) (en banc) the Court extrapolated from *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L. Ed. 2d 447 (1979) that under *Bell*, a "condition" refers to "general conditions, practices, rules, or restrictions of pretrial confinement," as opposed to "the episodic act or omission of a state jail official." *Hare*, at 644 & 647-648. The challenged conditions and systems meet this test.

Supervisors are often removed from the direct knowledge of the conditions that make a certain action by a jailer supervised deliberately indifferent to a known risk. However, cases have long held supervisors can be liable for setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. *Johnson v. Duffy*, 580 F.2d 740, 743-44 (9th Cir. 1978).

To fulfill the remedial purpose of § 1983 in the processing of this causation statute ("[a] any person who ... subjects, or causes to be subjected, any citizen ... or other person ... to the deprivation of rights, privileges, or immunities secured by the Constitution ... shall be liable to the party injured .... ') certiorari should be granted to consider whether to apply an objective

reasonableness test for Plaintiffs' detainee under *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L. Ed. 2d 447 (1979), and now *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

Plaintiff argued this theory at summary judgment (App. 75a-77-a) and on appeal. Grochowski's opening argument was whether *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) should have applied. (Eleventh Cir. No. 18-4567 filed 02/13/2019 p. 40 of 70).

The panel did not apply *Kingsley* to this conditions case, rejecting what it found would be a retroactive application of *Kinglsey*, stating that Grochowski was assaulted in 2012 and *Kinglsey* decided in 2015. (App. 13a n. 4).

The Second, Seventh and Ninth circuits have adopted the objective reasonable tests in conditions cases. *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017); *Miranda v. Cty. of Lake*, 900 F.3d 335, 350 (7th Cir. 2018); *Gordon v. Cty. Of Orange*, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018), *cert. denied*, No. 18-337, 2019 WL 113108 (Jan. 7, 2019); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070–71 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 831 (2017).

Certiorari is sought to stop the panel's published opinion from making n. 4 the springboard to clear water needlessly muddied. One could say there is a slight fissure or split in the circuits over a new issue the panel created in a footnote, where the others implicitly take a contrary position indeed.

On the other hand the panel should have used the *Bell* objective reasonableness test in this conditions case for a detainee, even if *Kingsley* is not retroactive. Certiorari s sought to apply *Bell*.

The panel ignored controlling Circuit law which held that jail condition cases brought by pretrial detainees are governed by the *Bell* standard as opposed to the subjective Eighth

Amendment standard. *Jones v. Diamond*, 636 F.2d 1364 (5th Cir. Jan. 29, 1981) (en banc) held that "[t]he due process clause accords pretrial detainees rights not enjoyed by convicted inmates, [w]hile a sentenced inmate may be punished ... the due process clause forbids punishment." *Id.* at 1368 (citing *Bell*).

Bell was reaffirmed in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), which reaffirmed *Bell's* reasonably-related test, underscoring that that test, is "solely an objective one." (*Kingsley* at 2473). The Court in *Bell* "did not consider the prison officials' subjective beliefs about the policy" and the *Bell* test does not "involve subjective considerations." (*Kingsley* at 2473-74).

Because supervisor acts should be considered, and the results monitored for compliance, it is fitting to effect the remedial intent of § 1983, to protect pre-trial detainees from conditions and systems that can ever so easily slide from being objectively unreasonable to punishments, where often the issue, like in this case is jail violence, where the only corporal punishment allowed is the death penalty, which is long on due process before implementation, but may not necessarily be so in a jail, while arrested on a DUI bench warrant.

Congress has a separate criminal punishment for jail supervisors who intend to cause a deprivation of civil rights, where specific intent to deprive one of a constitutional right must be shown in order to punish the official. 18 US.C. § 241 and 242. Section 1983 is a causation statute, and the reasoned conditions of the County and the jail supervisors' systems should be subject to an objective reasonableness test.

4. Certiorari is also sought the because in Georgia in the Eleventh claims against a Sheriff in his official capacity for jail administration are being treated as claims against a state

official, where the entity sued is deemed the state, and therefore that area of sheriff function is deemed barred by the Eleventh Amendment.

The trial court granted Sheriff Kembrough Eleventh Amendment immunity for all jail administration functions under *Purcell ex rel. Estate of Morgan v. Toombs Cnty., Ga.*, 400 F.3d 1313, 1325 (11th Cir. 2005) (quoting *Manders v. Lee*, 338 F.3d 1304, 1315 (11th Cir. 2003) (en banc) in Doc.57 p. 7-9.

If the jail administration system was done in an official capacity, and he or she is the final policy maker in that subject area, then the entity liability triggers, eliminating qualified immunity.

That remedial kind of conditions and system claim, against the person who made the same decision commensurate with his office, will now be against the induvial in that position and be subject to qualified immunity, though that person is still the official making the same kinds of decisions to create or implement systems.

Subjecting conditions and systems claims to qualified, undermines Congressional intent of § 1983 of having private attorneys general sue persons acting under color of law for the customs and usages that cause deprivation of federal rights, when before, that high same ranking official's actions and refusals to act as a policy maker would not be subject to qualified immunity.

Certiorari should be granted consider if an objective reasonableness test against the Sheriff in his individual capacity for the same acts of causation, might plug the hole in Georgia in the Eleventh Circuit.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted this 19th day of November, 2020.

/s/ John P. Batson
JOHN P. BATSON
1104 Milledge Road
Augusta, GA 30904
706-737-4040
jpbatson@aol.com

Attorney for Applicants/Petitioners
Counsel of Record