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.

APPENDIX

Petition for Writ of Certiorari
To the Eleventh Circuit

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November 19, 2020

Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14567

D.C. No. 1:14-cv-02586-TWT

DONALD GROCHOWSKI, as a representative administrator of the estate of Kenneth Grochowski, deceased, and, as next of kin to Kenneth Grochowski, and ADAM GROCHOWSKI, as next of kin to Kenneth Grochowski,

Plaintiffs - Appellants,

versus

CLAYTON COUNTY, GEORGIA, is sued through its chair Jeffrey E. Turner, and Commissioners in their official capacity, and through the Sheriff Kemuel Kimbrough, in his official capacity, individually and jointly, KEMUEL KIMBROUGH, is sued individually, and in his official capacity for actions under color of law as the Sheriff of Clayton County, individually and jointly, GARLAND WATKINS, ROBERT SOWELL, and SAMUEL SMITH,

Defendants - Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(June 22, 2020)

Before HULL, MARCUS, and EBEL,* Circuit Judges.

* The Honorable David M. Ebel, Senior United States Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

EBEL, Circuit Judge:

This § 1983 action arises out of the death of pretrial detainee Kenneth Grochowski at the hands of his cellmate, William Alexander Brooks, while both men were detained at the Clayton County Jail (the "Jail"). Brooks and Grochowski were both arrested on non-violent charges. Neither man had a history of violent felonies, and neither reported any mental health issues. Both men were classified as medium-security inmates and were assigned to the same cell.

On August 14, 2012, Brooks and Grochowski got into a fight in their cell over a piece of candy. Brooks beat Grochowski until he was unconscious, and then Brooks tried to drown Grochowski in the cell's toilet. Another inmate reported the assault to jail staff, and when staff arrived Grochowski was unresponsive. Grochowski was transported to a nearby medical center and was pronounced dead the following morning.

Grochowski's surviving adult children initiated this civil rights action against Clayton County, Georgia (the "County") and against four supervisors at the Jail—former Sheriff Kemuel Kimbrough, Chief Deputy Garland Watkins,

Major Robert Sowell, and Samuel Smith (the "Jail Supervisors").[1] Plaintiffs argued that the conditions at the Jail violated Grochowski's due process rights under the Fourteenth Amendment, and that those conditions caused Grochowski's death. The Jail Supervisors and the County together moved for summary judgment, arguing that the Jail Supervisors were entitled to qualified immunity, and that, under Monell v. Department of Social Services of New York, 436 U.S. 658 (1978), the County was not liable for any alleged constitutional violation. Plaintiffs opposed that motion and moved for partial summary judgment on their claims against the County. The district court entered an order granting the Jail Supervisors' and the County's motion for summary judgment and denying Plaintiffs' motion for partial summary judgment.

Plaintiffs now appeal that order, along with an earlier discovery ruling. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM both rulings.

I. BACKGROUND

[1] Plaintiffs also named as defendants several non-supervisory corrections officers, along with CorrectHealth, LLC ("CorrectHealth") and its employees. CorrectHealth is a private entity that contracts with Clayton County to provide health care at the Jail. At the summary judgment stage, the district court concluded that Plaintiffs had abandoned their claims against the non-supervisory officers and the CorrectHealth employees. The court then granted summary judgment for the entity CorrectHealth. Plaintiffs do not appeal those rulings.

Plaintiffs' claims center on the conditions at the Jail. In particular, Plaintiffs focus on the Jail's process for classifying and housing inmates and on the extent to which double-celled inmates are monitored.

The Jail's Classification Process

The Clayton County Jail employs a two-step classification process for new inmates. First, a healthcare provider either clears the inmate for placement in the general population or recommends another option, such as placing the inmate in the medical infirmary or the mental health infirmary. If the healthcare provider clears the inmate for placement in the general population, a corrections officer then determines whether the inmate should be placed in minimum-, medium-, or maximum-security housing. We refer to those processes respectively as the health screening and the security screening.

The health screening follows best practices issued by the National Commission on Correctional Healthcare. The screening consists of a face-to-face interview between a healthcare provider and an inmate. During the interview, the healthcare provider asks the inmate about his medical and mental health history, including his use of medications, hospitalizations, head trauma or seizures, suicidal attempts or ideations, violent behavior or victimization, and sexual offenses. The healthcare provider then conducts a physical assessment of the inmate, which includes assessing the inmate's vital signs,

general appearance, attitude, mood, and affect. In particular, the healthcare provider considers whether the inmate presents as evasive, defensive, guarded, angry, anxious, frustrated, hostile, euphoric, tearful, flat, or blunted.

The healthcare provider also completes a "SAD PERSONS" suicide screening, which generates a score based on indicators like the inmate's sex, age, history of depression, social support, and prior suicide attempts. A score less than six is considered low-risk for suicide; a score greater than eight is considered high-risk. If the results of the inmate's health history and physical assessment are within normal limits, the healthcare provider clears the inmate for placement in the general population. Both Grochowski and Brooks received SAD PERSONS scores of less than six.

The security screening, in contrast to the health screening, does not take place in a face-to-face interview with the inmate. Rather, a corrections officer relies on records to collect objective data about the inmate, including whether the inmate is currently charged with a violent felony, and whether the inmate has any prior violent felony convictions or any history of behavioral problems at the Jail. The corrections officer then inputs that data into an Initial Classification Form, which is a standard form that is endorsed by the National Institute of Corrections. The Initial Classification Form operates as a decision tree based on yes or no answers to nine questions. For example, if an inmate is

currently charged with a violent felony, the decision tree indicates that the inmate should be placed in maximum-security housing. If an inmate is not currently charged with a violent felony, has no prior violent felony convictions, and has no escape history, the decision tree indicates that the inmate should be placed in medium-security housing. Both Grochowksi and Brooks qualified under the housing decision tree for placement in medium-security housing.

Inmates are housed according to their security classification. Certain housing units are designated to house maximum-security inmates; others are designated to house medium-security inmates. Within those housing units, inmates are placed in particular cells based on available space.

Jail Design

The Jail has eight housing units, each with its own central control tower. Each housing unit has six pods and each pod has 16 cells, meaning that each housing unit has 96 cells.

Each cell has a solid door with a small window. The window measures approximately six inches wide by two or two-and-a-half feet tall. From the central control towers, officers have a clear view into each pod, but do not have a clear view into each cell. Officers do have a complete view of a cell's interior when they look through the cell door's window from two or three feet away.

The National Institute of Corrections does not suggest that a full view of every cell from a remote surveillance booth is necessary; rather, it recommends that remote surveillance booths "have a good view of cell fronts, dayrooms, and mezzanine walkways." The American Corrections Association takes the same position. The National Institute of Corrections, in fact, recommends against large windows on cell doors, as they raise privacy concerns and can cause conflict between inmates who are intentionally housed separately.

The Jail was designed to house two inmates per cell. It is standard practice—nationally and in the state of Georgia—to double-cell medium-security inmates in the general population.

Each cell is equipped with an emergency call button. There are no video cameras inside the cells.

Jail Staffing

Each housing unit is staffed with two officers: one guard in the control tower and one on the floor. That staffing plan is consistent with recommendations from the Georgia Sheriffs' Association. Officers conduct physical cell checks every hour and conduct a headcount three times per day at 6 a.m., 6 p.m., and midnight.

Budget Proposals and Staffing Requests

One of the Sheriff's duties is to present the County with budget proposals, and the County, in turn, is responsible for funding the Sheriff's operations. Former Sheriff Kemuel Kimbrough ("Sheriff Kimbrough") was elected Sheriff in 2008 and served a term beginning January 1, 2009 and ending December 31, 2012, which included the time of the incident resulting in Grochowski's death. In his budget proposals, Sheriff Kimbrough always requested additional staff, so as to reduce planned overtime and therefore increase safety and efficiency in the Jail.

A former sheriff, Sheriff Stanley Tuggle ("Sheriff Tuggle"), served as sheriff during an earlier time when the Jail was being designed and constructed. Sheriff Tuggle was elected in 1996, took office in 1997, and served until 2005. Sheriff Tuggle oversaw the transition from a previous facility to the Jail after the Jail's construction in 1999. In his 2002 budget proposal, Sheriff Tuggle informed the County that one housing unit was closed due to a staffing shortage. Still, Sheriff Tuggle testified in his deposition that the Jail had enough staff to handle the inmate population at that time, and that it did not have to resort to triple-celling inmates. In August 2012, when Grochowski was killed, one of the Jail's eight housing units was closed. There is no evidence in

the record to suggest that either Grochowski or Brooks would have been single-celled even if all housing units at the Jail had been open.

Arrest and Intake of Brooks

Twenty-year-old William Alexander Brooks was arrested on July 31, 2012 and charged with theft by receiving stolen property, giving a false name to an officer, driving on a suspended license, and not wearing a seat belt. Brooks was booked into the Jail on August 1, 2012. That day, Brooks underwent a health screening conducted by former defendant, CorrectHealth, LLC ("CorrectHealth")—a private entity that contracts with Clayton County to provide health care at the Jail. During the health screening, Brooks reported no past or current physical or mental health issues and denied any history of violent behavior. CorrectHealth employees noted that Brooks's vital signs, appearance, attitude, and affect were within normal limits. Brooks scored a "1" on the SAD PERSONS suicide screening—the lowest possible score for a male inmate. Brooks was therefore cleared for placement in the general population.

On August 2, 2012, Officer Lashanda Baker performed Brooks's security screening. Brooks's criminal history revealed no violent felony convictions, no escape history, and no past or present institutional behavioral problems. Officer Baker therefore classified Brooks as a medium-security inmate.

Plaintiffs point out, however, that Brooks had been convicted in 2009 for misdemeanor fighting, which was not considered under the security screening protocol.

Arrest and Intake of Grochowski

Fifty-seven-year-old Kenneth Grochowski was arrested on August 8, 2012 and charged with failure to appear on a DUI charge in Illinois. The same day, Grochowski was booked into the Jail and underwent a health screening conducted by CorrectHealth. CorrectHealth employees cleared Grochowski for housing in the general population. The next day, on August 9, 2012, Officer Baker performed Grochowski's security screening and classified Grochowski as a medium-security inmate.

The Fight Between Brooks and Grochowski

Brooks and Grochowski were both placed in Housing Unit 6. Brooks was initially placed in cell 209B, and Grochowski was placed in cell 210B. On August 11, 2012, Officer Paul McKibbins transferred Brooks into cell 210B with Grochowski. Officer McKibbins testified that he had never observed Brooks displaying erratic behavior or acting violently. He knew only that both Brooks and Grochowski had been classified as medium-security inmates. Officer McKibbins placed Brooks in cell 210B with Grochowski because "[i]t just happened [that] . . . at that particular time that space was available."

On August 14, 2012, at around 9:05 p.m., Brooks and Grochowski got into an argument over a piece of candy. According to Brooks, Grochowski took a swing at Brooks, and Brooks blocked the swing and hit Grochowski in the throat. Brooks continued to beat Grochowski and then tried to drown Grochowski by placing his head into the cell's toilet. Another inmate alerted jail staff of the assault, and Grochowski was found unresponsive in his cell. Grochowski was transported to Southern Regional Medical Center and was pronounced dead the morning of August 15, 2012.

Staffing and Cell Checks on August 14, 2012

On August 14, 2012—the night Grochowski was killed—officers performed hourly cell checks and routine headcounts. That night there were 21 officers, four supervisors, two deputies, and three clerks on shift in the Jail. In Housing Unit 6, one officer was assigned to the control tower and one officer was assigned to the floor.

II. DISCUSSION

A. The Summary Judgment Ruling

1. Standard of Review

"We review a district court's grant of summary judgment de novo, considering the facts and drawing all reasonable inferences in the light most favorable to the non-moving party." Melton v. Abston, 841 F.3d 1207, 1219 (11th Cir.

2016). "Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Id. (quoting Fed. R. Civ. P. 56(a)).

2. Applicable Law

Plaintiffs brought suit under 42 U.S.C. § 1983 against the Jail Supervisors in their individual capacities[2] and against the County. Plaintiffs' claims arise under the Fourteenth Amendment's Due Process Clause. Hamm v. DeKalb Cty., 774 F.2d 1567, 1572 (11th Cir. 1985) (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)). When analyzing claims under the Due Process Clause, the Eleventh Circuit often refers to precedent under the Eighth Amendment's Cruel and Unusual Punishment Clause.[3] Keith v. DeKalb Cty., 749 F.3d 1034, 1044 n.35 (11th Cir. 2014) (quoting City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983)); see also Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996). The Eleventh Circuit has thus recognized that

[2] Plaintiffs also sued the Jail Supervisors in their official capacities. All but one of the official capacity claims were dismissed, and the district court granted summary judgment for the Jail Supervisors on the remaining official capacity claims. Plaintiffs do not challenge those rulings on appeal.

[3] Because Grochowski was a pretrial detainee and had not been convicted, he was not susceptible to any criminal punishment as such. However, he could be confined pending trial, and that confinement necessarily required restrictions on him in a jail setting. So long as those restrictions have a "legitimate governmental objective" and are not imposed for the purpose of punishment, the Fourteenth Amendment is not violated. Hamm, 774 F.2d at 1573 (quoting Bell, 441 U.S. at 539). In this case, Plaintiffs have made no adequate argument that the restrictions upon Grochowski were unrelated to a legitimate governmental objective, so we do not address that issue further.

"[a] prison official's deliberate indifference to a known, substantial risk of serious harm to an inmate violates the Fourteenth Amendment." Keith, 749 F.3d at 1047 (alteration incorporated) (quoting Marsh v. Butler Cty., 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc), abrogated on other grounds by Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)). "Whether a risk of harm is substantial is an objective inquiry." Id. The "deliberate indifference" component is a subjective inquiry that requires a plaintiff to show that the defendants "acted with a sufficiently culpable state of mind."[4] Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004) (quoting Hudson v. McMillian, 503 U.S. 1, 8 (1992)).

3. Claims against the Jail Supervisors

As to the Jail Supervisors, Plaintiffs identify two conditions, which, they argue pose a substantial risk of serious harm to inmates at the Jail. First, they argue that the Jail's classification process does not adequately identify inmates with violent or assaultive tendencies, which leads to nonviolent inmates being double-celled with violent inmates. Second, they argue that the Jail's practice

[4] Plaintiffs urge us to dispense with the subjective component, as the Supreme Court did in Kingsley v. Hendrickson, 576 U.S. 389 (2015) for excessive force claims arising under the Fourteenth Amendment. We decline to apply Kingsley because Grochowski's death occurred in 2012 and Kingsley was decided in 2015. We are not aware of any court that has ruled that Kingsley has retroactive effect. We therefore do not consider whether Kingsley would otherwise be applicable.

of performing hourly rounds is insufficient to ensure the safety of inmates while they are inside their cells.[5]

The Jail Supervisors argue that they are entitled to qualified immunity on these claims. In order to show that an officer is entitled to qualified immunity, the officer must show that he or she was acting within the scope of his or her discretionary authority at the time of the alleged wrongful acts. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). There is no dispute in this case that the Jail Supervisors were acting within the scope of their discretionary authority at all relevant times. The burden therefore shifts to the Plaintiffs, who must show, first, that the officers "violated a constitutionally protected right," and second, "that the right was clearly established at the time of the misconduct." Melton, 841 F.3d at 1221. We may address those elements in any order. Id. (citing Pearson v. Callahan, 555 U.S. 223, 236 (2009)). Here, we begin and end our

[5] Plaintiffs also raise arguments about the Jail's physical design and its funding levels within their claims against the Jail Supervisors. In Georgia, the Office of the Sheriff (which, in this case, includes the Jail Supervisors) is responsible for the administration and daily operations of the Jail. Purcell ex rel. Estate of Morgan v. Toombs Cty., 400 F.3d 1313, 1325 (11th Cir. 2005). The design of the Jail and the Jail's funding levels, however, are not matters of Jail administration. The record shows that the County worked with an architectural firm to design and construct the Jail in 1999; the Jail Supervisors were not involved in the design process. The record also shows that the Sheriff submits budget proposals to the County, but the County is ultimately responsible for making funding decisions. We therefore restrict our consideration of the Jail's design and its funding to our discussion of the County's liability below.

analysis by concluding that Plaintiffs have failed to show that the Jail Supervisors violated a constitutionally protected right.[6]

a. Classification Process

Plaintiffs argue that the Jail's classification process poses a substantial risk of serious harm because corrections officers do not perform the security screening in face-to-face interviews with inmates and because the Initial Classification Form does not account for violent misdemeanors. As a result, they argue, violent inmates can be double-celled with non-violent inmates, which can lead to in-cell assaults. Plaintiffs argue that if the security screening had been conducted in person and if it had accounted for violent misdemeanors, the Jail Supervisors would have identified Brooks as being potentially violent, particularly in light of his 2009 conviction for misdemeanor fighting. Plaintiffs have failed to show, however, that the Constitution requires in-person security screenings or consideration of violent misdemeanors.

[6] We assume that the Jail Supervisors are officers with some supervisory authority at the Jail. Had Plaintiffs shown that Grochowski's constitutional rights were violated, which they have not done, they would also have needed to show that the Jail Supervisors either "personally participate[d] in the alleged constitutional violation or [that] there is a causal connection between actions of the [Jail Supervisors] and the alleged constitutional deprivation." Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990). Because we conclude that no constitutional violation occurred, we do not reach that issue. See Beshers v. Harrison, 495 F.3d 1260, 1264 n.7 (11th Cir. 2007) ("We need not address the Appellant's claims of municipal or supervisory liability since we conclude no constitutional violation occurred.").

Plaintiffs cite case law for the proposition that jail classification systems must consider an inmate's capacity for violence. See Gates v. Collier, 501 F.2d 1291, 1308–09 (5th Cir. 1974).[7] However, the Jail's classification process does consider an inmate's capacity for violence. The classification process begins with a health screening, which is conducted according to best practices issued by the National Commission on Correctional Healthcare. The healthcare screening takes place in a face-to-face interview, during which a healthcare provider asks the inmate if he has any history of violent behavior or victimization. The healthcare provider also assesses the inmate's appearance, attitude, mood, and affect. Those measures assist the healthcare provider in determining, in the first instance, whether it is appropriate to place inmates in the general population.

A corrections officer then conducts a security screening based on objective criteria, such as the inmate's current charges, history of violent felony convictions, and any disciplinary records from previous detentions at the Jail. Those objective criteria are collected on an Initial Classification Form, which is endorsed by the National Institute of Corrections. The Initial Classification Form functions as a decision tree based on those objective criteria, and it

[7] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. Id. at 1209.

adequately considers an inmate's capacity for violence in determining whether the inmate should be placed in minimum-, medium-, or maximum-security housing. Plaintiffs have simply failed to show that the Jail's classification system does not adequately consider an inmate's capacity for violence.

b. Hourly Rounds

Plaintiffs next argue that the Jail's practice of performing hourly rounds is insufficient to supervise double-celled inmates and therefore poses a substantial risk of serious harm to inmates at the Jail. Plaintiffs have failed to show that the Constitution requires jail officials to conduct rounds more frequently than once per hour.

To the contrary, the Jail Supervisors cite cases to demonstrate that hourly rounds are constitutionally adequate. In Cagle v. Sutherland, a jail official violated a consent decree from previous litigation that required hourly cell checks. 334 F.3d 980, 985 (11th Cir. 2003). That official let one hour and forty minutes elapse between cell checks and during that time an inmate died. Id. at 989. The court observed that the consent decree "did not establish a constitutional right to hourly jail checks." Id. Cagle, then, suggests that even hourly cell checks are not constitutionally required. See also Popham v. City of Talladega, 908 F.2d 1561, 1565 (11th Cir. 1990) (holding that jail officials were entitled to qualified immunity because the plaintiff "cite[d] no cases for

the proposition that deliberate indifference is demonstrated if prisoners are not seen by jailers at all times"). We recognize that Cagle and Popham addressed the subjective component of deliberate indifference rather than the objective component of a substantial risk of serious harm. Still, we think these cases support our conclusion here that the Jail's practice of conducting hourly rounds is constitutionally adequate.

Plaintiffs have failed to show that either the Jail's classification process or its practice of hourly rounds pose a substantial risk of serious harm to inmates at the Jail. Therefore, Plaintiffs have failed to show that those conditions violated Grochowski's rights under the Fourteenth Amendment.[8] Absent any constitutional violation, the Jail Supervisors are entitled to summary judgment on the basis of qualified immunity.[9]

4. Claims against the County

As to the County, Plaintiffs again identify two conditions which, they argue, pose a substantial risk of serious harm to inmates at the Jail. First, they argue that the design of the Jail makes it difficult to monitor inmates in cells,

[8] Because Plaintiffs failed to show that the challenged conditions pose a substantial risk of serious harm, we need not also consider whether the Jail Supervisors acted with deliberate indifference to a substantial risk of serious harm.

[9] Absent any violated right, we need not support our qualified immunity conclusion by also considering whether "the right was clearly established at the time of the misconduct." Melton, 841 F.3d at 1221.

meaning that in-cell assaults may go undetected. Second, they argue that the Jail is underfunded and understaffed, which makes it impractical for the officers to conduct rounds more frequently than once per hour. A county is liable under § 1983 if one of its "customs, practices, or policies" was the "moving force" behind a constitutional injury. Barnett v. MacArthur, 956 F.3d 1291, 1296 (11th Cir. 2020). To prevail on such a claim, "a plaintiff must show: (1) that his constitutional rights were violated; (2) that the [County] had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). Again, Plaintiffs have failed to show that Grochowski's "constitutional rights were violated."

a. Jail Design

Plaintiffs argue that the Jail's design poses a substantial risk of harm to inmates at the Jail because corrections officers do not have a clear view into each cell from the central control towers. Plaintiffs note that each cell has a solid door with a small window, which is approximately six inches wide by two or two-and-a-half feet tall. From the central control towers, officers cannot clearly see the interior of a cell through the small window. This, Plaintiffs argue, puts inmates at a substantial risk of undetected in-cell assaults.

Plaintiffs' position amounts to an argument that the constitution requires continuous observation of double-celled inmates. As described above, our precedent undermines that suggestion. See Cagle, 334 F.3d at 989; Popham, 908 F.2d at 1565. What's more, the Jail's design is consistent with national standards. Both the National Institute of Corrections and the American Corrections Association recommend only that officers in remote surveillance booths, like the control towers here, have a good view of cell fronts and walkways. Neither organization recommends that jails install large windows on cell doors to facilitate remote surveillance of a cell's interior. To the contrary, the National Institute of Corrections notes that large windows on cell doors can raise problems such as privacy concerns and increased conflict between inmates who are intentionally housed separately.

We also note that each cell is equipped with an emergency call button, which enables inmates to send an emergency signal to officers in the control tower. This would seem to mitigate risk associated with the small windows on cell doors. And, as discussed above, the Jail accounts for an inmate's capacity for violence when making housing unit assignments. That, too, mitigates the risk of undetected in-cell assaults. Again, Plaintiffs have simply failed to show that the Jail's design is constitutionally deficient.

b. Funding and Staffing

Plaintiffs next argue that the County failed to fund the Jail adequately, leaving the Jail understaffed. Plaintiffs argue that the Jail's staffing levels accommodated only hourly rounds and caused the Jail to close one of its housing units, which remained closed at the time of Grochowski's death. Plaintiffs argue that these conditions posed a substantial risk of serious harm to inmates at the Jail. Again, Plaintiffs have failed to show that the Jail's funding and staffing levels fall below constitutional minima.

As described above, the constitution does not require continuous observation of double-celled inmates. The record shows that the Jail had sufficient staff to perform regular, hourly rounds. Staffing levels were also sufficient to comply with the recommendation from the Georgia Sheriffs' Association that two guards—one in the control tower and one on the floor—monitor each housing unit.

The record also shows that, notwithstanding the closure of one of the Jail's housing units, the Jail was able to house inmates according to its design, with two inmates per cell. There is no evidence that the Jail had to resort to triple-celling inmates as a result of the housing unit closure. Nor is there any evidence that, had the additional housing unit been open at the time of Grochowski's death, the Jail would have opted to single-cell any inmates that ordinarily would have been double-celled. And, of course, even had some

inmates been single-celled, there is no evidence that Brooks or Grochowski would have been among those inmates.

The record does show that both Sheriff Kimbrough and Sheriff Tuggle requested additional funding from the County in order to increase staffing and thereby increase efficiency and safety at the Jail. But Plaintiffs have failed to show that the existing funding and staffing levels posed a substantial risk of serious harm to inmates at the Jail.

Again, Plaintiffs have failed to show that either the Jail's design or its funding and staffing levels violated Grochowski's Fourteenth Amendment rights. Therefore, the County is entitled to summary judgment.[10]

B. The Discovery Ruling

In the course of discovery on Plaintiffs' claims against the County, Plaintiffs sought to depose non-party Crandle Bray, former Chairman of the Clayton County Board of Commissioners, regarding his decision-making process with respect to the design and funding of the Jail. On November 15, 2017, the County filed a Motion for Protective Order, or in the alternative,

[10] Absent any constitutional violation, we need not consider whether the County had any "custom or policy that constituted deliberate indifference" to Grochowski's constitutional rights, or whether "the policy or custom caused the violation." See McDowell, 392 F.3d at 1289.

Motion to Quash the Subpoena issued to Bray. After conducting a hearing, the district court granted that motion. Plaintiffs challenge that ruling on appeal.

"[W]e will not overturn discovery rulings 'unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case.'" Iraola & CIA, S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1286 (11th Cir. 2003) (quoting Carmical v. Bell Helicopter Textron, Inc., 117 F.3d 490, 493 (11th Cir. 1997)). Plaintiffs have failed to show that the district court's ruling caused substantial harm to their case. As described above, Plaintiffs failed to show that the Jail's design or its funding and staffing levels were constitutionally deficient. Therefore, it would not have aided Plaintiffs' case to obtain information about the County's decision-making process with respect to the Jail's design or funding. We therefore affirm the district court's order granting the County's Motion for Protective Order.

III. CONCLUSION

The district court's order granting the Jail Supervisors' and the County's Motion for Summary Judgment is AFFIRMED. The district court's order granting the County's Motion for Protective Order is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONALD GROCHOWSKI
as a representative administrator of the estate of Kenneth Grochowski, deceased, et al.,

Plaintiffs,

v.

CLAYTON COUNTY, GEORGIA
is sued through its Chair Jeffrey E. Turner, and Commissioners in their official capacity, and through the Sheriff Kemuel Kimbrough, in his official capacity, individually and jointly, et al.,

Defendants.

CIVIL ACTION FILE
NO. 1:14-CV-2586-TWT

OPINION AND ORDER

This is a civil rights action. It is before the Court on the Defendants CorrectHealth, LLC, James Rose and Walter Smith's Motion for Summary Judgment [Doc. 137]; the Defendants Clayton County, Kemuel Kimbrough, Garland Watkins, Robert Sowell, and Samuel Smith's Motion for Summary Judgment [Doc. 138]; and the Plaintiffs' Motion for Partial Summary Judgment [Doc. 139]. For the reasons set forth below, (1) the Defendants CorrectHealth, LLC, James Rose and Walter Smith's Motion for Summary Judgment [Doc. 137] is GRANTED; (2) the Defendants Clayton County, Kemuel Kimbrough, Garland

Watkins, Robert Sowell, and Samuel Smith's Motion for Summary Judgment [Doc. 138] is GRANTED; and (3) the Plaintiffs' Motion for Partial Summary Judgment [Doc. 139] is DENIED.

I. Background

This case arises from the death of the Plaintiffs' decedent, Kenneth Grochowski, at the hands of William Alexander Brooks while both men were detained at the Clayton County Jail. Twenty year old William Alexander Brooks was arrested on July 31, 2012.[1] He was charged with misdemeanor offenses of theft by receiving stolen property, giving a false name to an officer, driving on a suspended license, and not wearing a seatbelt.[2] Brooks was booked into the Jail on August 1, 2012.[3] Brooks underwent an initial medical assessment conducted by the Defendant CorrectHealth's employees.[4] CorrectHealth is a private entity that contracts with Clayton County to provide health care to inmates and pre-trial detainees held at the Jail.[5] During the assessment, Brooks self-reported no past or current physical or mental health issues and denied any

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[1] County and Supervisory Defendants' Statement of Material Facts ¶ 1 [Doc 138-2].

[2] *Id.*

[3] *Id.* ¶ 2.

[4] *Id.* This included physical and mental assessments by the trained nursing staff and review by a physician assistant.

[5] Compl. ¶ 90 [Doc. 1].

history of violent behavior.[6] The CorrectHealth employees conducting the assessment concluded that Brooks' vital signs, general appearance, attitude, and affect were all within normal limits.[7] Therefore, Brooks was cleared for housing within the general population.[8]

The classification officer on duty at the time, Officer Lashanda Baker, completed Brooks' Classification Form.[9] Officer Baker reviewed Brooks' criminal history and determined that Brooks had no violent felony convictions, no escape history, and no past or present institutional or behavioral problems.[10] Therefore, Officer Baker classified Brooks as a medium security inmate.[11] There is no evidence that any of the individual Defendants were aware (as alleged in the Complaint) of any erratic behavior by Brooks prior to August 14, 2012.

Fifty-seven year old Kenneth Grochowski was arrested on August 8, 2012, and charged with failure to appear on a DUI charge in Illinois.[12] He was booked

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[6] CorrectHealth's Statement of Material Facts ¶ 9 [Doc. 137-4].

[7] *Id.* ¶¶ 11-12.

[8] *Id.* ¶ 17.

[9] County and Supervisory Defendants' Statement of Material Facts ¶ 4.

[10] *Id.* The criminal history and current charges of an inmate are not provided to the medical staff by the jail security staff.

[11] *Id.*

[12] *Id.* ¶ 5.

into the Jail the same day.[13] Grochowski underwent a medical assessment and was cleared for housing within the general population.[14] Officer Baker completed his Classification Form and classified him as a medium security inmate.[15]

Brooks and Grochowski were housed in the same cell beginning August 11, 2012.[16] On August 14, 2012, at or around 9:05 pm, Brooks began beating Grochowski until he was unconscious, and forcefully placed Grochowski's head in the toilet in an attempt to drown him.[17] Another inmate alerted jail staff of the assault, and Grochowski was found unresponsive in his cell.[18] Grochowski was transported to Southern Regional Medical Center where he was pronounced dead the morning of August 15, 2012.[19]

The Jail was designed to house two inmates per cell.[20] There are ninety-six cells and a central control tower in each of the Jail's eight Housing

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[13] *Id.* ¶ 6.

[14] *Id.* ¶ 7.

[15] *Id.* ¶ 8.

[16] *Id.* ¶ 10.

[17] *Id.* ¶ 12.

[18] *Id.* ¶¶ 13-15.

[19] *Id.* ¶ 18.

[20] County and Supervisory Defendants' Statement of Material Facts ¶ 25.

Units.[21] The cells have a solid door with a small window.[22] Two corrections officers are assigned to each Housing Unit per shift, one in the control tower and one on the floor.[23] The parties dispute whether the officer stationed in the control tower can see into the cells.[24] Each cell, including the one that housed Brooks and Grochowski, is equipped with an emergency call button.[25] It is the policy of the Jail to conduct physical cell checks every hour and headcounts three times a day.[26] The corrections officers on duty followed these policies on the night of the assault.[27]

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[21] *Id.* ¶¶ 23-24.

[22] *Id.* ¶ 27.

[23] *Id.* ¶ 37.

[24] The Defendants claim that the officer in the control tower has a "clear view" of some of the cell's interior but cannot see the entire cell. *Id.* ¶ 28. The Plaintiffs claim that the officer in the control tower cannot see into the cell at all. Pls.' Resp. to County and Supervisory Defendants' Statement of Material Facts ¶ 28 [Doc. 171].

[25] Pls.' Resp. to County and Supervisory Defendants' Statement of Material Facts ¶ 32.

[26] County and Supervisory Defendants' Statement of Material Facts ¶ 39. The Plaintiffs dispute that this policy is always followed, *see* Pls.' Resp. to the County and Supervisory Defendants' Statement of Material Facts ¶ 39, but do not dispute that the policy was followed on the night of the assault, see *id.* ¶ 19.

[27] County and Supervisory Defendants' Statement of Material Facts ¶ 19.

The Plaintiffs, the decedent's adult children, filed this action on August 11, 2014.[28] The Plaintiffs named as defendants the County; CorrectHealth and various employees; the Sheriff; and various supervisors and corrections officers employed by the Sheriff's Office.[29] At this stage in the litigation, the Plaintiffs have abandoned all claims against non-supervisory jail personnel, as well as those against CorrectHealth's employees. Therefore, the remaining Defendants are the County, CorrectHealth, the Sheriff, and three jail supervisors who, it is alleged, are responsible for the day-to-day administration of the Jail. The Sheriff and the jail supervisors are collectively referred to as the "Supervisory Defendants" in this Order. These Defendants and the Plaintiffs move for summary judgment.

II. Summary Judgment Standard

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law.[30] The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant.[31] The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material

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28 Compl. ¶ 4.

29 *Id.*

30 Fed R. Civ. P. 56(c).

31 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

fact.[32] The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists.[33]

III. Discussion

This Order will review each Defendant's potential liability in turn, beginning with CorrectHealth.

A. CorrectHealth

In their Complaint, the Plaintiffs allege that the "acts, omissions, policies, and customs" of CorrectHealth and its employees resulted in violations of the decedent's Eighth and Fourteenth Amendment rights, including "the right to be free of cruel and unusual punishment, the right to be protected, and the right to medical care while incarcerated."[34] The Plaintiffs appended a state law negligence claim to their § 1983 claim, alleging that CorrectHealth's employees breached their duty to the decedent by failing to perceive or mitigate the danger that Brooks posed to other detainees.[35] The Plaintiffs have abandoned all claims against CorrectHealth employees, and this Court holds that the remaining

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[32] *Celotex Corp. V. Catrett*, 477 U.S. 317, 323-24 (1986).

[33] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

[34] Compl. ¶ 126.

[35] First Am. Compl. ¶ 9 [Doc. 4].

CorrectHealth employees should be dismissed from this action.[36] This Court is called upon to determine whether summary judgment is appropriate as to the Plaintiffs' claims against CorrectHealth as a private entity.

1. § 1983 Claim

CorrectHealth is amenable to suit under § 1983 because it has contracted to perform a function "traditionally within the prerogative of" the County, namely the provision of medical care to incarcerated persons.[37] Therefore, this Court will treat CorrectHealth as the "functional equivalent" of a municipality for the purposes of determining its liability under § 1983. There is no respondeat superior liability for a municipality under section 1983. A municipality can be liable under § 1983 only when execution of its official "policy or custom" is the "moving force" behind a constitutional violation.[38] A municipality is liable only for policies promulgated or ratified by officials with "final policymaking authority."[39] A municipality cannot be liable for the acts of officials that it has no authority to control.[40]

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[36] Consent Stipulation for Dismissal [Doc. 28]; Pls.' Reply Br. to CorrectHealth's Mot. for Summ. J., at 1 n.1 [Doc. 176].

[37] *Buckner v. Toro*, 116 F.3d 450, 452 (11th Cir. 1997).

[38] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

[39] *Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir. 1996).

[40] *Grech v. Clayton Cty.*, 335 F.3d 1326, 1331 (11th Cir. 2003) (citing *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir. 1998)).

CorrectHealth contends that none of its policies or customs were the moving force behind the constitutional violations alleged by the Plaintiffs. CorrectHealth asserts that the physical and mental health assessment performed on Brooks by its employees met the relevant standard of care and that the test results indicated no need for an immediate mental health referral.[41] CorrectHealth further asserts that neither CorrectHealth nor its employees have any input in detainees' security classifications or where they are housed in the facility.[42] The Plaintiffs do not dispute the truth of any of CorrectHealth's proffered facts. Rather, they contend that the quality of care provided to Brooks is immaterial because Brooks' initial assessment was "inadequate for purposes of classification and assessment of assaultive tendencies to determine suitability for double-celling."[43] It appears from Plaintiffs' briefing that the "policy or custom" complained of is the double-celling of detainees without adequate safeguards to prevent inmate-on-inmate violence.

The Plaintiffs' theory of liability fails as a matter of law because CorrectHealth plays no role in setting classification policies for the Jail and lacks the authority to do so. The parties agree that neither CorrectHealth nor

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[41] CorrectHealth's Mot. For Summ. J., at 10 [Doc. 137-1].

[42] CorrectHealth's Reply Br. in Supp. of Mot. For Summ. J., at 2 [Doc 181].

[43] Pls.' Resp. to CorrectHealth's Statement of Material Facts in Supp. of Mot. For Summ. J., at 11-15 [Doc. 176-1].

its employees have any input in classification or housing decisions.[44] The Sheriff and his subordinates are solely responsible for setting classification policy. In his capacity as jail administrator, the Sheriff acts as an arm of the state and is not subject to the control of the County or to entities operating on County-delegated authority.[45] Because CorrectHealth exercises no control over the policy maker responsible for setting classification policy, CorrectHealth cannot be liable under § 1983.[46]

The Plaintiffs seek to establish CorrectHealth's responsibility to assess detainees for security risks by pointing to language in the County's 2008 Request for Proposal.[47] That document suggests that the health care provider will have "primary, but not exclusive responsibility for all the identification, care and treatment of inmates who are 'security risks' or who present a danger to

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[44] CorrectHealth's Reply Br. in Supp. of Mot. for Summ. J., at 2 [Doc 181]; *accord* Pls.' Resp. Br. to CorrectHealth's Mot. for Summ. J., at 5 n.8 [Doc. 176] ("CorrectHealth personnel did not provide 'any input' for the Sheriff employee's decisions as to 'medium or maximum security and room assignment,' which was 'completely up to' the Sheriff's employees.") (citing Pedersen Decl. ¶ 31 [Doc. 137-2]).

[45] *Purcell ex rel. Estate of Morgan v. Toombs Cty., Ga*, 400 F.3d 1313, 1325 (11th Cir. 2005) (citing *Manders v. Lee*, 338 F.3d 1304, 1315 (11th Cir. 2003)).

[46] *See Grech*, 335 F.3d at 1343 (holding that local government entities cannot be liable for the acts of the Sheriff over which it has no control).

[47] *See* Doc. 173-2.

themselves and others."[48] But whether or not the County actually sought to assign CorrectHealth primary responsibility to conduct risk assessments is beside the point. Final decisions on classification and housing decisions rest with the Sheriff as a matter of law.[49] Because the County itself has no authority to control the Sheriff in his capacity as jail administrator, it follows that the County could not delegate such authority to a private entity by contract. The contractual language at issue cannot establish that officials subject to CorrectHealth's control had, or should have had, the authority to set classification and housing policies in the Jail. Therefore, CorrectHealth's contract with the County cannot sustain a finding of liability under § 1983.

2. State Law Negligence Claim

CorrectHealth argues that it is not liable for negligence under Georgia law because Brooks' health screening met the standard of care and because the Defendant had no input into classification or housing decisions at the Jail.[50] The Plaintiffs provide no response to CorrectHealth's arguments in their reply briefing. Indeed, the Plaintiffs did not address their state law negligence claims at all in their response brief. Therefore, this Court finds that the Plaintiffs have

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[48] Pls.' Resp. to CorrectHealth's Statement of Material Facts, at 11 (citing Request for Proposal, at 30 [Doc. 173-2]).

[49] *Purcell*, 400 F.3d at 1325.

[50] CorrectHealth's Mot. For Summ. J., at 15-16.

abandoned their state law negligence claim.[51] In any event, the Plaintiffs' negligence claim was premised on the idea that CorrectHealth's failure to assign a heightened security classification to Brooks caused harm to the decedent. Undisputed facts in the record establish that CorrectHealth had no duty to and did not participate in classification decisions. Thus, the Plaintiffs cannot establish a prima facie case for negligence against CorrectHealth and the claim fails as a matter of law.

B. Supervisory Defendants

The Plaintiffs sued the Supervisory Defendants in their individual and official capacities for "acts, omissions, policies, and customs" that they allege violated the decedent's rights secured by the Eighth and Fourteenth Amendments.[52] In its Order of Dismissal, this Court dismissed all claims against the Supervisory Defendants in their official capacities except for those concerning inadequate provision of medical care.[53] As for the claims against the Supervisory Defendants in their individual capacities, this Court dismissed the Plaintiffs' failure to train claim but did not dismiss the Plaintiffs' claims

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[51] *See Gore v. Jacobs Eng'g Grp.*, 706 F. App'x 981, 986 (11th Cir. 2017) ("[F]ailure to brief and argue [an] issue during the proceedings before the district court is grounds for finding that the issue has been abandoned.") (citing *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000)).

[52] Compl. ¶ 115. The rights identified by the Plaintiffs included the right to be free from cruel and unusual punishment, the right to be protected, and the right to medical care while incarcerated.

[53] Order of Dismissal, at 8 [Doc. 57].

concerning the Supervisory Defendants' personal participation in a constitutional violation.[54] The Plaintiffs subsequently amended their complaint to add claims for conditions of confinement that violated the decedent's right not to be punished prior to adjudication of guilt.[55] The Plaintiffs also added a § 1983 claim on their own behalf for loss of familial association.[56] At summary judgment, the Supervisory Defendants request Eleventh Amendment immunity for the claims against them in their official capacities and qualified immunity for the claims against them in their individual capacities.[57]

The claim for loss of familial association is easily resolved. The County and the Supervisory Defendants raised defenses to this claim in their briefing to which the Plaintiffs failed to respond.[58] The Plaintiffs have therefore abandoned this claim and it is dismissed accordingly.[59] As for the remaining claims, this Court holds that the Supervisory Defendants are entitled to immunity for the reasons provided below.

1. Official Capacity Claims

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[54] *Id.*, at 10-11.

[55] Second Am. Compl. ¶¶ 67-88 [Doc. 73].

[56] Second Am. Compl. ¶ 89.

[57] County and Supervisory Defendants' Mot. for Summ. J., at 12-22.

[58] *Id.* at 22-23.

[59] *See Gore*, 706 F. App'x at 985.

Failure to provide medical care is the sole remaining claim against the Supervisory Defendants in their official capacities.[60] The Supervisory Defendants contend that the medical care that Brooks and the decedent received at initial intake was not constitutionally defective and that, in any event, the Plaintiffs have provided no evidence that the Supervisory Defendants were deliberately indifferent to the allegedly deficient medical care.[61] The Supervisory Defendants have established sufficient grounds to make the official capacity claims against them subject to summary adjudication, and the Plaintiffs do not substantively respond to the Supervisory Defendants' arguments regarding the sufficiency of the medical care provided to Brooks and the decedent. As such, the claim against the Supervisory Defendants in their official capacities should be dismissed.

Although it is not clear from the Plaintiffs' briefing, the Plaintiffs could be arguing that the Supervisory Defendants are liable because the results of inmates' medical screening are not taken into account during the classification and housing process. As this Court already explained in its Order of Dismissal, however, the Supervisory Defendants are entitled to Eleventh Amendment immunity for all claims pertaining to jail administration, which includes classification and housing decisions.[62] Because the Plaintiffs allege that the

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60 Order of Dismissal, at 8.

61 County and Supervisory Defendants' Mot. for Summ. J., at 12-13.

62 Order of Dismissal, at 8.

harm arose from the Jail's classification system rather than from the medical care itself, the Plaintiffs cannot sustain their claims regarding inadequate provision of medical care against the Supervisory Defendants in their official capacities.

2. Individual Capacity Claims

The Supervisory Defendants argue that they are entitled to qualified immunity for the section 1983 claims brought against them in their individual capacities. Qualified immunity exempts an officer from section 1983 liability under certain circumstances.[63] To be entitled to qualified immunity in the Eleventh Circuit, an officer must show that he was acting within the scope of his discretionary authority at the time of the alleged wrongful acts.[64] Once the officer has proved that he was within the scope of his discretionary authority, the plaintiff must show that the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[65] In order to establish that a reasonable officer would have known of a right, a plaintiff must show development of law in a "concrete and factually defined context" such that a reasonable officer would know that his conduct violated federal law.[66] Two questions are central to the qualified immunity defense. First,

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63 *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

64 *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

65 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

66 *Jackson v. Sauls*, 206 F.3d 1156, 1164-65 (11th Cir. 2000).

the Court must determine whether there was a violation of a constitutional right.[67] Second, the Court must then determine whether the right was clearly established.[68] There is no dispute that the Supervisory Defendants were acting within the scope of their discretion at all times relevant to this suit.[69] Therefore, the burden is on the Plaintiffs to establish that the Supervisory Defendants violated clearly established law.

a. Constitutional Violation

A jail supervisor may be liable under § 1983 when that supervisor personally participates in a constitutional deprivation or when there is a causal connection between the supervisor's acts and the constitutional deprivation.[70] When considering the claims of pretrial detainees, liability can attach when a "prison official's deliberate indifference to a known, substantial risk of serious harm violates the [Fourteenth] Amendment."[71] A showing of deliberate indifference requires "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than gross negligence."[72]

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67 *Hope v. Pelzer*, 536 U.S. 730, 736-42 (2002).

68 *Lee*, 284 F.3d at 1194.

69 Compl. ¶ 6; County and Supervisory Defendants' Mot. for Summ. J., at 19 n.3.

70 *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990).

71 *Keith v. DeKalb Cnty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014).

72 *Id.* at 1047.

Although the Plaintiffs alleged in their original complaint that the Supervisory Defendants personally participated in the decision to house Brooks with the decedent,[73] the Plaintiffs appear to have dropped that line of argument at summary judgment. Therefore, the question before this Court is whether the Supervisory Defendants' policies or practices caused the decedent to be deprived of his constitutional rights.[74]

The Plaintiffs identify various policies and practices that they allege violated the decedent's constitutional rights. First, they allege that the Jail was designed such that all detainees are double-celled without continuous observation by the jail staff.[75] Second, they allege that the Jail was underfunded and understaffed, preventing jail staff from single-celling assaultive detainees and conducting continuous rounds.[76] Third, they allege that the screening, classification, and cell-assignment processes were "grossly inadequate" and resulted in non-violent detainees being housed with violent detainees.[77] Fourth, they allege that the Defendants had a "practice" of failing to prevent in-cell

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[73] Compl. ¶¶ 31-33. The Plaintiffs alleged that the Supervisory Defendants personally observed "erratic behavior" displayed by Brooks but failed to make any changes to his security designation or housing assignment.

[74] *Keith*, 749 F.3d at 1048.

[75] Pls.' Resp. Br. to County and Supervisory Defendants' Mot. for Summ. J., at 2.

[76] *Id.*

[77] *Id.* at 3.

assaults because they did not investigate or seek to change the conditions that gave rise to previous in-cell assaults.[78]

The Plaintiffs insist that these policies and practices constitute "conditions of confinement" that should be analyzed under the objective test articulated by the Supreme Court in *Bell v. Wolfish*.[79] The Supreme Court held in *Bell* that conditions claims brought by pretrial detainees arise under the Fourteenth Amendment, which prohibits punishment prior to the adjudication of guilt.[80] A condition of confinement violates the Fourteenth Amendment if it is imposed with the intent, express or inferred, to punish the pretrial detainee.[81] The Eleventh Circuit, however, has held that the decisional law applicable to prison inmates applies equally to pretrial detainees.[82] As a result, the Eleventh Circuit has required plaintiffs challenging conditions of confinement to show both that the deprivation suffered was objectively serious and that prison officials were deliberately indifferent to the violation of the plaintiff's

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[78] *Id.* at 4.

[79] 441 U.S. 520 (1979); Pls.' Mot. for Partial Summ. J., at 1-2 [Doc. 142] (arguing that the *Bell* standard applies to the Plaintiffs' claims).

[80] *Bell*, 441 U.S. at 535-36.

[81] *Id.* at 538-40.

[82] *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1574 (11th Cir. 1985); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996).

constitutional rights.[83] The Plaintiffs argue that the recent Supreme Court case *Kingsley v. Hendrickson* abrogates Eleventh Circuit precedent such that the Plaintiffs need only satisfy *Bell*'s objective standard without a showing of deliberate indifference.[84]

The Plaintiffs' argument regarding the reach of *Kingsley* is unpersuasive. The Eleventh Circuit has thus far declined to apply *Kingsley* beyond the excessive force context in which it arose, despite opportunities to do so.[85] The Plaintiffs give this Court no compelling reason to depart from decades of binding case law establishing that plaintiffs must show deliberate indifference in prison conditions cases. This Court need not reach the question of whether the Supervisory Defendants were deliberately indifferent, however, because none of the challenged policies created an objectively substantial risk of serious

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[83] *See Evans v. St. Lucie Cty. Jail*, 448 F. App'x 971, 973–75 (11th Cir. 2011) (requiring that a pretrial detainee bringing a prison conditions case show that (1) the deprivation was "sufficiently serious" and (2) prison officials had a "sufficiently culpable state of mind") (citations omitted).

[84] 135 S. Ct. 2466 (2015); Pls.' Mot. for Partial Summ. J., at 8-9 (arguing that the Plaintiffs need not show that the defendants were deliberately indifferent in prison conditions cases).

[85] *See Nam Dang ex rel Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (declining to extend *Kingsley's* holding to a pretrial detainee's claim of inadequate medical treatment); *see also Collins v. Bates*, No. 2:14-CV-231-WHA, 2017 WL 4054160, at *4 (M.D. Ala. Aug. 4, 2017) (compiling cases in which the Eleventh Circuit has applied the deliberate indifference standard to prison conditions cases brought by pretrial detainees post-*Kingsley*), *report and recommendation adopted*, No. 2:14-CV-231-WHA, 2017 WL 3951601 (M.D. Ala. Sept. 8, 2017).

harm.[86] Nor do the facts support the inference that any of the policies were implemented with the intent to punish inmates at the Jail.

The Plaintiffs criticize the Jail's "objective" classification process on the grounds that classification officers do not conduct face-to-face interviews with inmates and do not consider violent misdemeanors.[87] As a result, the Plaintiffs argue, inmates with assaultive tendencies are double-celled with non-violent inmates, making in-cell assaults substantially more likely.[88] The Plaintiffs cite case law standing for the proposition that classification systems cannot be random and must at least consider inmates' capacity for violence.[89] Although jail administrators must consider an inmate's capacity for violence during the classification process, it is not the role of the judiciary to second-guess administrative decisions about which indicators should be considered and how they should be weighed. This Court is mindful of the Supreme Court's admonition that jail administrators "should be accorded wide-ranging deference

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[86] *Keith*, 749 F.3d at 1047 ("Whether a risk of harm is substantial is an objective inquiry.") (citing *Marsh v. Butler Cty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001)).

[87] Pls.' Mot. for Partial Summ. J., at 16-18.

[88] *Id.*

[89] *Cf. Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974) ("The inmates are not classified according to the severity of their offense, resulting in the intermingling of inmates convicted of aggravated violent crimes with those who are first offenders or convicted of nonviolent crimes."); *Jensen v. Clarke*, 94 F.3d 1191, 1199 (8th Cir. 1996) ("random" assignment of inmates based only on space availability created a substantial risk of harm).

in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."[90] The classification system in place at the Jail takes into account various security-related factors, including the inmates' history of violent felonies and disciplinary records from previous detentions at the facility.[91] The Plaintiffs put forward several recommendations for how the classification process could be changed to better detect an inmate's propensity for violence. But the dispositive question is not whether the classification system could be improved.[92] Rather, the question is whether the existing system falls below what the Constitution minimally requires.[93] Even assuming that these incidents could be fairly traced to the Jail's classification system, a few isolated events from several

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[90] *Bell*, 441 U.S. at 547.

[91] County and Supervisory Defendants' Statement of Material Facts in Supp. of Mot. for Summ. J. ¶ 33.

[92] *Bell*, 441 U.S. at 562 ("The first question to be answered is not whose plan is best, but in which branch of the Government is lodged the authority to initially devise the plan… [T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution[.]").

[93] Pls.' Additional Statement of Material Facts ¶¶ 1-3. The Plaintiffs in fact identify six in-cell fights that occurred between May 12, 2007 and April 24, 2009. For two of these fights, however, the Plaintiffs provide no information as to the participants' criminal histories. *Id.* ¶¶ 4-5. As for the altercation between Antonio Raspberry and Bruce Goodman, see *id.* ¶ 6, that incident occurred in administrative segregation, not general population, and is therefore of little relevance to the case at bar. *See Goodman v. Kimbrough*, 718 F.3d 1325, 1329 (11th Cir. 2013).

years prior are simply not enough to establish a causal connection between the challenged classification system and the allegedly unsafe conditions at the Jail.[94] The Plaintiffs further assert that at least 115 in-cell assaults occurred in the Jail between 2010 and 2012.[95] The County and the Supervisory Defendants have objected to the methodology by which the Plaintiffs came by their figures and the manner in which it has been presented to this Court.[96] Even if the Plaintiffs' numbers are correct, however, the Plaintiffs do not identify which, if any, of these assaults would not have occurred but for the inadequate classification system. The evidence provided by the Plaintiffs could not persuade a reasonable factfinder that the Supervisory Defendants' classification policies created an objectively serious risk of harm.

The Plaintiffs' evidence concerning the Jail's supervision policies is similarly insufficient. As with the classification system, the Plaintiffs put forward several means by which the inmate supervision could be improved. The Plaintiffs suggest that cell doors could have larger windows; that audio or video monitoring devices could be installed in each cell; or that more corrections

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[94] A history of widespread abuse can put the supervisory official on notice of the need to take corrective action. *Brown*, 906 F.2d at 671. But "the deprivations that constitute widespread abuse... must be obvious, flagrant, and of continued duration, rather than isolated occurrences." *Id.*

[95] Pls.' Mot. for Partial Summ. J., at 14.

[96] *See* Notice of Objection to Pls.' Summary Chart [Doc. 165]; County and Supervisory Defendants' Reply Br. in Support of Mot. for Summ. J., at 10-11.

officers could be assigned to each shift.[97] These suggestions appear designed to achieve the goal of continuous or near-continuous supervision of cell interiors. But the Plaintiffs do not provide, and this Court is unaware of, any cases holding that continuous supervision of double-celled inmates is required by the Constitution. Identifying the minimal constitutional requirements for inmate supervision is challenging because of the fact-specific nature of prison conditions cases. Eleventh Circuit precedent, however, would appear to set the bar well below the conditions challenged in this case. In *Popham v. City of Talladega*, the widow of a man who committed suicide while detained in a city jail brought suit against jail officials for failure to protect and properly monitor her decedent.[98] The portion of the cell in which the suicide occurred was not in view of the jail's video monitoring system, and no jail staff were on duty to conduct physical checks.[99] The Eleventh Circuit nevertheless rejected the claim, noting that the plaintiff had "cite[d] no cases for the proposition that deliberate indifference is demonstrated if prisoners are not seen by jailers at all times."[100] In *Cagle v. Sutherland*, the Eleventh Circuit held that a one hour forty minute gap between cell checks did not amount to deliberate indifference, notwithstanding a

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[97] Pls.' Resp. to County and Supervisory Defendants' Statement of Material Facts ¶¶ 29-30, 38.

[98] 908 F.2d 1561, 1563 (11th Cir. 1990).

[99] *Id.* at 1565.

[100] *Id.*

previous consent decree mandating hourly cell checks at the prison.[101] The Eleventh Circuit noted that the consent decree "did not establish a constitutional right to hourly jail checks" strongly suggesting that, in the Eleventh Circuit's view, even hourly cell checks are not constitutionally required.[102] The out-of-circuit cases that the Plaintiffs marshal in support of the contrary proposition do not go so far as to require continuous observation and, in any event, present factual scenarios quite distinct from the case before this Court.[103] The Plaintiffs' evidence is not sufficient to show that lack of continuous observation deprived any inmate of his or her constitutional rights.

In addition to the Jail's classification and supervision policies, the Plaintiffs challenge what they characterize as a "policy of allowing in-cell

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101 334 F.3d 980, 989 (11th Cir. 2003).

102 *Id.*

103 In *Lareau v. Manson*, the Second Circuit adopted the magistrate judge's finding that double celling inmates without providing adequate means of contacting guards violates the Eighth Amendment. 651 F.2d 96, 108 n.11 (2d Cir. 1981). The record on appeal is silent as to the frequency of physical cell checks (or even whether such checks occurred at all) or the presence or absence of emergency call buttons in the cell. And, even taking into account the magistrate judge's findings, the Second Circuit concluded that holding pretrial detainees in such conditions was constitutionally permissible for a period of 15 days or less. *Id.* at 105. In *Hart v. Sheahan*, the Seventh Circuit considered a case in which jail staff did not observe inmates for a period of forty eight to fifty consecutive hours while the staff conducted weapons and contraband checks in different sections of the jail. 396 F.3d 887 (7th Cir. 2005). The remarkable and easily distinguishable facts in that case make it wholly unhelpful in addressing the issues presently before this Court.

assaults to go un-prevented."[104] While the Plaintiffs list this policy as a condition of confinement subject to review under the *Bell v. Wolfish* standard, it is difficult to conceptualize how the failure to investigate the causes of previous in-cell assaults could be a "condition" imposed on current detainees. In their briefing, the Plaintiffs assert that this policy "reeks of deliberate indifference"—apparently arguing that the supervisors were deliberately indifferent to an excessive risk of inmate-on-inmate violence.[105] The evidence to support this allegation is thin at best. Jail officials are not the guarantors of inmate safety.[106] In order to establish that inmate-on-inmate violence is excessive, the Plaintiffs must show that "violence and terror reign" at the Jail.[107] Inmates must be exposed to a near-constant threat of violence.[108] The Plaintiffs assert that there had been 115 in-cell assaults over a period of about three years leading up to the attack.[109] The Plaintiffs further assert that the rate of in-cell assaults is "high" in proportion to the total number of assaults over the same

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[104] Pls.' Resp. Br. to County and Supervisory Defendants' Mot. for Summ. J., at 3.

[105] *Id.* at 16.

[106] *Popham*, 908 F.2d at 1564.

[107] *Purcell*, 400 F.3d at 1320.

[108] *Id.*

[109] Pls.' Mot. for Partial Summ. J., at 14.

period.[110] But, even if the Plaintiffs have the numbers right, an in-cell assault rate of roughly thirty eight per year is not sufficient to show that the "violence and terror reign" at the Jail or that inmates are subject to a "constant threat of violence." It is not incumbent on the Supervisory Defendants to investigate the root causes of every in-cell assault, particularly when the incident records relied on by the Plaintiffs show that the perpetrators of the assaults are quickly identified and appropriate disciplinary action is taken. The Plaintiffs make much of the case *Goodman v. Kimbrough*, in which the Sheriff was sued in his official capacity after a detainee was brutally beaten by his cell-mate while in administrative segregation.[111] But the constitutional adequacy of the Jail's classification and supervision policies were not at issue in the case. On the contrary, it was deviations from official policy–namely deactivating emergency call buttons and failing to conduct cell checks and head counts–that gave rise to claims in *Goodman*.[112] There is no sense in which *Goodman* could have put the Supervisory Defendants on notice of a substantial risk posed by their classification and supervision policies. Thus, the Supervisory Defendants cannot as a matter of law be liable for their alleged policy of "allowing in-cell assaults to go unprevented."

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110 *Id.*

111 *Goodman*, 718 F.3d at 1329.

112 *Id.* at 1335 ("Goodman does not allege that any official Sheriff's Department policy violated his constitutional rights.").

Because this Court concludes that none of the challenged policies give rise to an objectively substantial risk of serious harm as a matter of law, it is perhaps redundant to consider whether these policies constitute unconditional conditions of confinement as urged by the Plaintiffs. Regardless, the Plaintiffs cannot prevail even by application of their preferred standard. There is nothing on the record to suggest that the Supervisory Defendants implemented the aforementioned policies with the express intent to punish detainees. Thus, in order to prevail the Plaintiffs must show that the challenged conditions are not reasonably related to any legitimate penological purpose. The factfinder would then be permitted, but not required, to draw the inference that the conditions were imposed with the intent to punish detainees. In this case, the Jail's classification, supervision, and housing policies are clearly related to the Supervisory Defendants' legitimate penological interests in "preserv[ing] internal order and discipline and to maintain institutional security."[113] This Court declines the Plaintiffs' invitation to view each absence of some additional safety measure as a condition of confinement that itself must further a penological interest. Insofar as the absence of additional safeguards requires explanation, the Supervisory Defendants supply penological interests, like ensuring that classification systems are unbiased and protecting inmate privacy,

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[113] *Bell*, 441 U.S. at 547.

that the Plaintiffs fail to meaningfully refute.[114] Moreover, the Eleventh Circuit has recognized "reasonably limit[ing] the cost of detention" as a legitimate penological interest, notwithstanding the Plaintiffs' protestations to the contrary.[115] In short, the Plaintiffs' evidence cannot give rise to the inference that the challenged conditions are unconstitutional punishments. The Supervisory Defendants are entitled to qualified immunity on the grounds that the Plaintiffs cannot show that their policies violated the decedent's constitutional rights.

b. Clearly Established Law

Even if the Plaintiffs could establish that the decedent's constitutional rights were violated, they cannot establish that the Supervisory Defendants violated clearly established law. For the law to be so clearly established as to overcome qualified immunity, it must have "earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates

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[114] The Plaintiffs insist that protecting inmate privacy is not a legitimate penological interest because inmates' privacy rights are substantially curtailed while incarcerated. Pls.' Mot. for Partial Summ. J., at 10-11 [Doc. 142]. But the Plaintiffs' discussion of the privacy rights of inmates is beside the point. The Supervisory Defendants may well have an interest in preserving inmate privacy even if the inmates do not have a right to demand privacy.

[115] *Hamm*, 774 F.2d at 1573.

federal law."[116] For the purposes of determining whether the law is clearly established, this Court may consider only decisions from the Eleventh Circuit, the Supreme Court, and the Georgia Supreme Court.[117]

The Plaintiffs provide only two cases for this Court's consideration, neither of which are sufficient to overcome the high bar that the Eleventh Circuit has set for overcoming a defendant's claim of qualified immunity. In *Hale v. Tallapoosa County*, the plaintiff was placed in a 13-by-20-foot "bullpen" with over a dozen other inmates, none of whom were segregated based on their proclivity for violence.[118] The plaintiff, who was booked for failure to appear, was attacked by a detainee booked for murder and attempted murder.[119] The sole corrections officer tasked with monitoring the bullpen checked in only twice over a five hour period.[120] In short, the facts of *Hale* are not sufficiently similar to those in this case to have given the Supervisory Defendants notice that their policies violated clearly established law.

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116 *Jenkins by Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 823 (11th Cir. 1997) (quoting *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146 (11th Cir. 1994)).

117 *Id.* at 826 n.4.

118 50 F.3d 1579, 1580-81 (11th Cir. 1995).

119 *Id.*

120 *Id.*

The facts of *Marsh v. Butler County, Ala.* are even further removed from those presented in this case.[121] In *Marsh*, the plaintiffs were assaulted and injured by prisoners at the Butler County Jail. The plaintiffs raised the following claims regarding conditions at the jail:

> 1) there was no segregation of nonviolent inmates from violent inmates, pretrial detainees from convicted criminals, juveniles from adults, or inmates with mental disorders from those without mental disorders, 2) at times the Jail housed more prisoners than the cells could accommodate, 3) the Jail was routinely understaffed, 4) no head counts of prisoners were made to make sure they were all accounted for, 5) locks on cell doors were not functional, allowing inmates to roam freely at all hours of the day, 6) homemade weapons were readily available by fashioning weapons from material torn from the dilapidated structure of the Jail, 7) no lock down of prisoners in their cells occurred at any point during the day or night, 8) cells were not visually inspected, 9) no jailer was assigned to maintain prisoners' security on the second floor where most of the inmates were housed, 10) the Jail was not operated in accordance with written policies, 11) inmates were not screened for mental health, medical conditions or conflicts with other prisoners before entering the Jail, and 12) prisoners were not disciplined or segregated when they attempted to escape, threatened jailers, destroyed property or assaulted other inmates.[122]

These conditions reflect a total abdication of the jail officials' duty to classify, supervise, and otherwise protect the inmates and detainees at the Butler County Jail. But, precisely because the alleged conditions are so shocking, *Marsh* is of little assistance to the Plaintiffs in establishing that the Supervisory Defendants violated clearly established law. *Marsh*, like *Hale*, could not have

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[121] 268 F.3d 1014 (11th Cir. 2001).

[122] *Id.* at 1029.

put a reasonable jail official on notice that an "objective" classification system or lack of continuous supervision could violate inmates' constitutional rights. Thus, the Plaintiffs cannot meet their burden of showing that the Supervisory Defendants violated clearly established law.

C. The County

The Plaintiffs seek to hold the County liable for "systemic conditions of confinement" at the Jail that create an unreasonable risk of inmate-on-inmate violence.[123] The Plaintiffs challenge (1) elements of the Jail's structure that make it difficult to continuously observe inmates; (2) an alleged policy of underfunding the Jail resulting in the Jail being understaffed; (3) an allegedly inadequate classification system; and (4) an alleged failure to investigate the causes of in-cell assaults.[124] And, as already covered in the forgoing discussion of the claims against the Supervisory Defendants, the Plaintiffs assert that they need not show that the County or any of its policymakers were deliberately indifferent to an objectively substantial risk of serious harm.

Notwithstanding the Plaintiffs' insistence that the County and the Supervisory Defendants are jointly and severally liable for each of the challenged conditions, this Court holds that the County cannot be found liable for constitutional violations arising from the challenged housing and

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[123] Pls.' Mot. for Partial Summ. J., at 1.

[124] Pls.' Resp. Br. to County and Supervisory Defendants' Mot. for Summ. J., at 2-3.

classification decisions or from the alleged failure to investigate and ameliorate the causes of in-cell assaults. Under Georgia law, the Sheriff, and not the County, is responsible for the day to day operation of the jail.[125] In matters of jail administration, the Sheriff is an arm of the state and his actions cannot give rise to County liability when he acts in his capacity as jail administrator.[126] The County has no authority to establish or modify the jail's housing and classification policies. Nor can the County require the Sheriff to engage in "systemic reviews" or investigate in-cell assaults.[127] As such, this Court will assess only those claims concerning matters over which the County had the final say–namely, the Jail's structure and funding.

The County is liable under § 1983 if its policies or customs were the "moving force" behind a constitutional violation.[128] The plaintiff must show "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional

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125 *Purcell*, 400 F.3d at 1325.

126 *Id.*

127 The Plaintiffs argue that the classification system is a "County practice pursuant to its medical duty[.]" Pls.' Resp. Br. to County and Supervisory Defendants' Mot. for Summ. J., at 21. For the same reasons that CorrectHealth is not liable for harm arising from the classification system, the County is not liable for the same.

128 *Monell*, 438 U.S. at 694.

right; and (3) that the policy or custom caused the violation."[129] Georgia counties have statutory duties involving "jail structure[,] inmates' food, clothing, and medical necessities."[130] The Plaintiffs argue that, because this is a conditions of confinement claim, they need not show that the County was deliberately indifferent to the risk that its policies or customs would give rise to unconstitutional conditions of confinement.[131] This Court need not reach the question of whether the County was deliberately indifferent, however, because the Plaintiffs cannot clear the first hurdle of showing that the challenged conditions of confinement were unconstitutional. As already discussed in the context of the Supervisory Defendants' liability for inadequate supervision, the Constitution does not require that double-celled inmates be continuously observed. It follows that elements of the Jail's design that make continuous observation difficult cannot give rise to liability for the County. As for the Plaintiffs' argument concerning underfunding, the Plaintiffs have not shown that staffing levels at the Jail fall below constitutional minima. There is also no evidence in the record suggesting that more officers would have been assigned

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[129] McDowell v. Brown, 392 F.3d 1283, 1289 (11th Cir. 2004) (*citing City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

[130] *Manders*, 338 F.3d at 1322.

[131] Pls.' Mot. for Partial Summ. J., at 8-9.

to the night shift if the County had provided additional funding.[132] The Plaintiffs' argument that the County's jail design and funding decisions are not related to a legitimate penological interest is foreclosed by the Eleventh Circuit's holding in *Hamm* that "reasonably limit[ing] the cost of detention" is a legitimate penological interest.[133] Therefore, the County is not liable under § 1983 for the challenged conditions or policies.

IV. Conclusion

For the forgoing reasons, (1) the Defendants CorrectHealth, LLC, James Rose and Walter Smith's Motion for Summary Judgment [Doc. 137] is GRANTED; (2) the Defendants Clayton County, Kemuel Kimbrough, Garland Watkins, Robert Sowell, and Samuel Smith's Motion for Summary Judgment [Doc.138] is GRANTED; and (3) the Plaintiffs' Motion for Partial Summary Judgment [Doc. 139] is DENIED.

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[132] The Plaintiffs make much of the fact that a housing unit at the Jail was closed at the time of the assault. Pls.' Reply Br. in Supp. of Mot. for Partial Summ. J. [Doc. 186]. The Plaintiffs argue that, had the housing unit been open, jail officials would have been able to single-cell assaultive detainees. But whether assaultive detainees could have been housed in the closed unit is irrelevant. Brooks was classified as a medium security, non-assaultive inmate and so would not have been single-celled even if the option were available. Thus, there is no possible way in which the closure of the housing unit could have caused the decedent harm.

[133] *Hamm*, 774 F.2d at 1573.

SO ORDERED, this 28 day of September, 2018.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONALD GROCHOWSKI, as a Representative administrator of the Estate of Kenneth Grochowski, Deceased, and DONALD GROCHOWSKI and ADAM GROCHOWSKI, as next of kin To Kenneth Grochowski,	)	CASE NO.: 1:14-CV-02586-TWT
Plaintiffs,	)	
v.	)	
CLAYTON COUNTY, GEORGIA, et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on Defendant Clayton County, Georgia's Motion for Protective Order, or in the alternative, Motion to Quash the Subpoena issued to former Clayton County Commissioner Crandle Bray filed on November 8, 2017. (Doc. 107.) Plaintiffs filed their Response on November 15, 2017 (Doc. 108) and the Court held a hearing in Chambers on November 29, 2017 (Doc. 117).

Upon consideration of the briefs and the arguments of counsel at the November 29, 2017, the Court hereby GRANTS the Motion for Protective Order (Doc. 107).

Plaintiffs attempt to depose non-party Crandle Bray, former Chairman of the Clayton County Board of Commissioners, regarding his decision-making process with respect to any design or budget considerations in constructing the current Clayton County Jail. The County objects to the deposition of its former Chairman based on legislative immunity, the Apex doctrine, and improper service of a subpoena under Rule 45(b).

The decision to enter a protective order is within the Court's discretion and does not depend on a legal privilege. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1548 (11th Cir. 1985). Rule 26(c) provides that upon a showing of good cause, a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

It is well-established Georgia law that individual members of a local governing body are entitled to absolute legislative immunity from litigation which arises from their legislative functions. Fulton County v. Dangerfield, 260 Ga. 665, 666-67, 398 S.E.2d 14, 15 (1990); Jackson v. Delk, 257 Ga. 541, 543, 361 S.E.2d 370, 372 (1987).

This immunity is more than a defense to liability; it is a testimonial

privilege. Thus, "in a judicial proceeding, the testimony of a legislator, with respect to the legislative intent underlying the enactment of a particular piece of legislation, is inadmissible." Jackson, 257 Ga. at 543, 361 S.E. at 372 (holding that trial court erred in requiring county commissioners to submit to deposition questioning concerning their individual intentions with respect to rezoning decision). Georgia courts have consistently rejected attempts to inquire into the subjective intent of a local governing body. In fact, the Georgia Supreme Court has held that local legislators are not required to appear and testify in response to a subpoena, even where they did not seek a protective order beforehand. Doyal v. Fulton County, 259 Ga. 482, 482, 384 SE 2d 390, 391 (1989).

The doctrine of legislative immunity is equally well-established under Federal law. Yeldell v. Cooper Green Hosp. Inc., 956 F.2d 1056, 1060 (11th Cir. 1992). This privilege was extended to state legislators for actions taken "in the sphere of legitimate legislative activity" in the Supreme Court case of Tenney v. Brandhove, 341 U.S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), and further expanded in this Circuit to include local legislators in Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981). See also DeSisto Colley, Inc. v. P. Line, 888 F.2d 755, 764-65 (11th Cir. 1989); Baytree of Inverarry Realty Partners v. City of Lauderhill, 873 F.2d 1407, 1409 (11th Cir. 1989); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982).

Legislative immunity attaches when legislators engage "in legislative activity." DeSisto College Inc., 888 F.2d at 765 (11th Cir. 1989). Under Eleventh Circuit law, engaging in legislative activity means any "conduct in furtherance of [the legislator's] duties." Id. (citing Hernandez, 643 F.2d at 1193). The nature of the legislative act "determines whether legislative immunity shields the individual from suit." Yeldell, 956 F.2d at 1062. Protected acts are those that are "an integral part of the deliberative and communicative processes by which [legislators] participate in ... proceedings with respect to the legislation." Smith v. Lomax, 45 F.3d 402, 405 (11th Cir. 1995). These acts include activities such as voting, speech making on the floor, preparing committee reports, and participating in committee investigations and proceedings. Yeldell, 956 F.2d at 1062; DeSisto, 888 F.2d at 765.

"Legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege... Thus, a state legislator acting 'within the sphere of legitimate legislative activity' may not be a party to a civil suit concerning those activities ... nor may he be required to testify regarding those same actions." Marylanders for Fair Representation, Inc. v. Shaefer, 144 F.R.D. 292, 297-98 (D. Md. 1992); see also Burtnick v. Mclean, 76 F.3d 611, 613 (4th Cir. 1996) (holding that members of a Board of Estimates in a discrimination case pursuant to 42 U.S.C. §§1981 and 1983 were privileged not to

testify -- "[Plaintiff's] attempt to establish a prima facie case will have to be accomplished without the testimony of the members of the Board ...."). Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); see also Marx v. Gumbinner, 855 F.2d 783, 788 (11th Cir. 1988) (explaining that immunity covers "other burdens attendant to litigation, including pretrial discovery").

In Roma Outdoor Creations, Inc. v. City of Cumming, No. 2:07-CV-0133-WCO, 2008 U.S. Dist. LEXIS 120896, at *8-9 (N.D. Ga. Sep. 18, 2008), for example, the court found that legislative immunity protected a city mayor from deposition. In so doing, the Court stated:

> Since legislative immunity extends to both executive officers conducting legislative activities and pretrial discovery, the doctrine plainly applies to the deposition of a mayor regarding the application of a city ordinance. Defendants correctly argue that the mayor's interpretation of an ordinance that governs public votes that he regularly casts falls within a quintessentially legislative domain. As such, legislative immunity prevents the plaintiff from being able to force the mayor's hand.

City of Cumming, 2008 U.S. Dist. LEXIS 120896, at *8.

In this case, plaintiffs desire to depose former Chairman Bray as to design considerations and aspects of the budget that the former Board of Commissioners considered in the development of the current Clayton County Jail. Plaintiffs therefore seek to inquire as to former Chairman Bray and the Board's motives and purposes and their deliberative and communicative processes. This line of inquiry

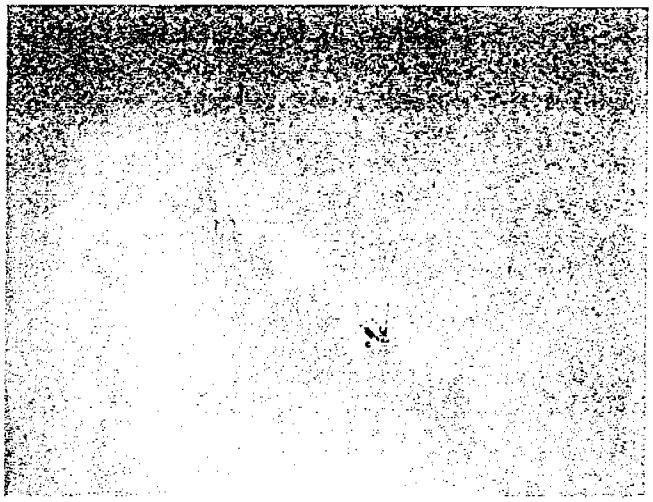
is related purely to legislative decisions, and former Chairman Bray is entitled to the testimonial privilege attached to the applicability of legislative immunity.

Therefore, the County's motion for protective order is GRANTED.[1]

SO ORDERED this 20th day of December, 2017.

/s/Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

[1] Because the Court finds that Commissioner Bray is entitled to legislative immunity, the Court declines to address Clayton County's arguments with respect to the Apex doctrine and improper service of the subpoena.

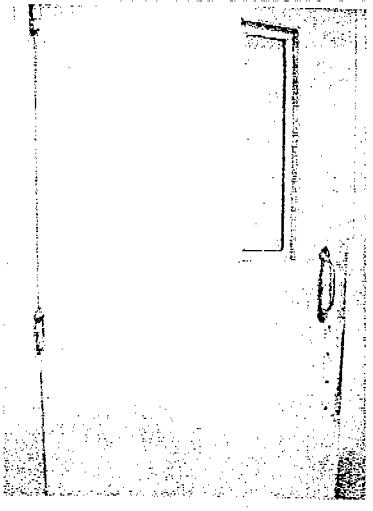


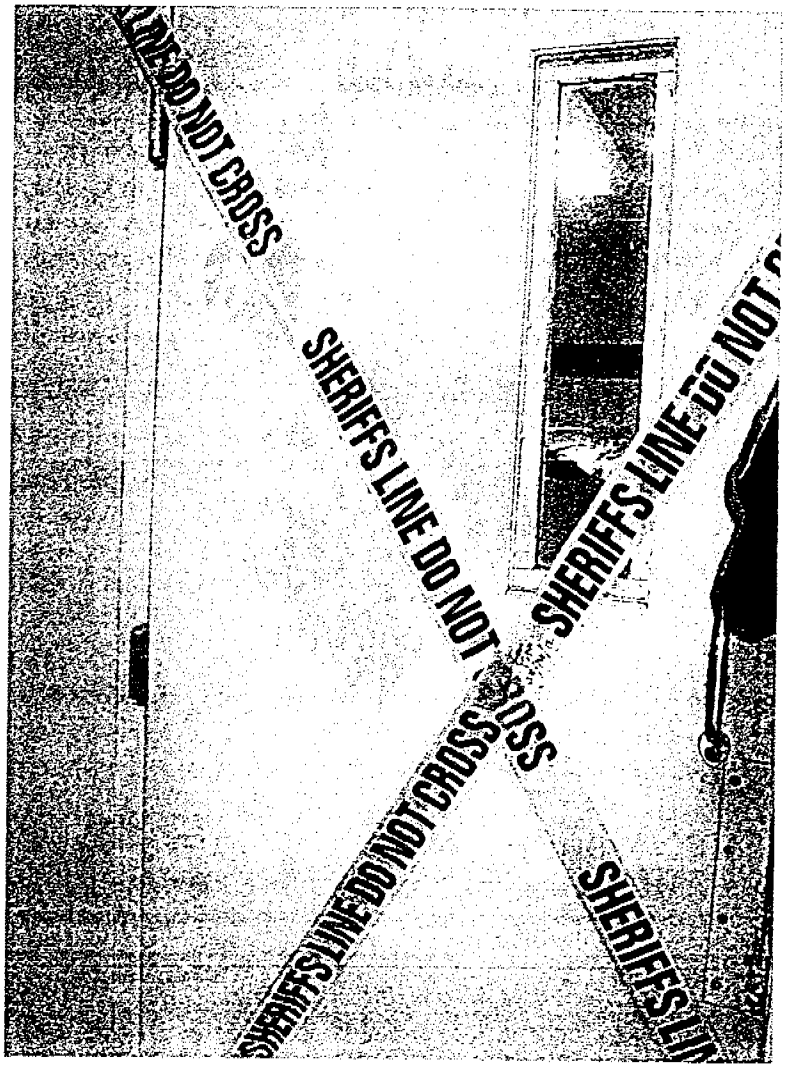
Blood drop on cell floor

EMS Team Assistance

EMS Team Assistance

Cell#6210 after incident

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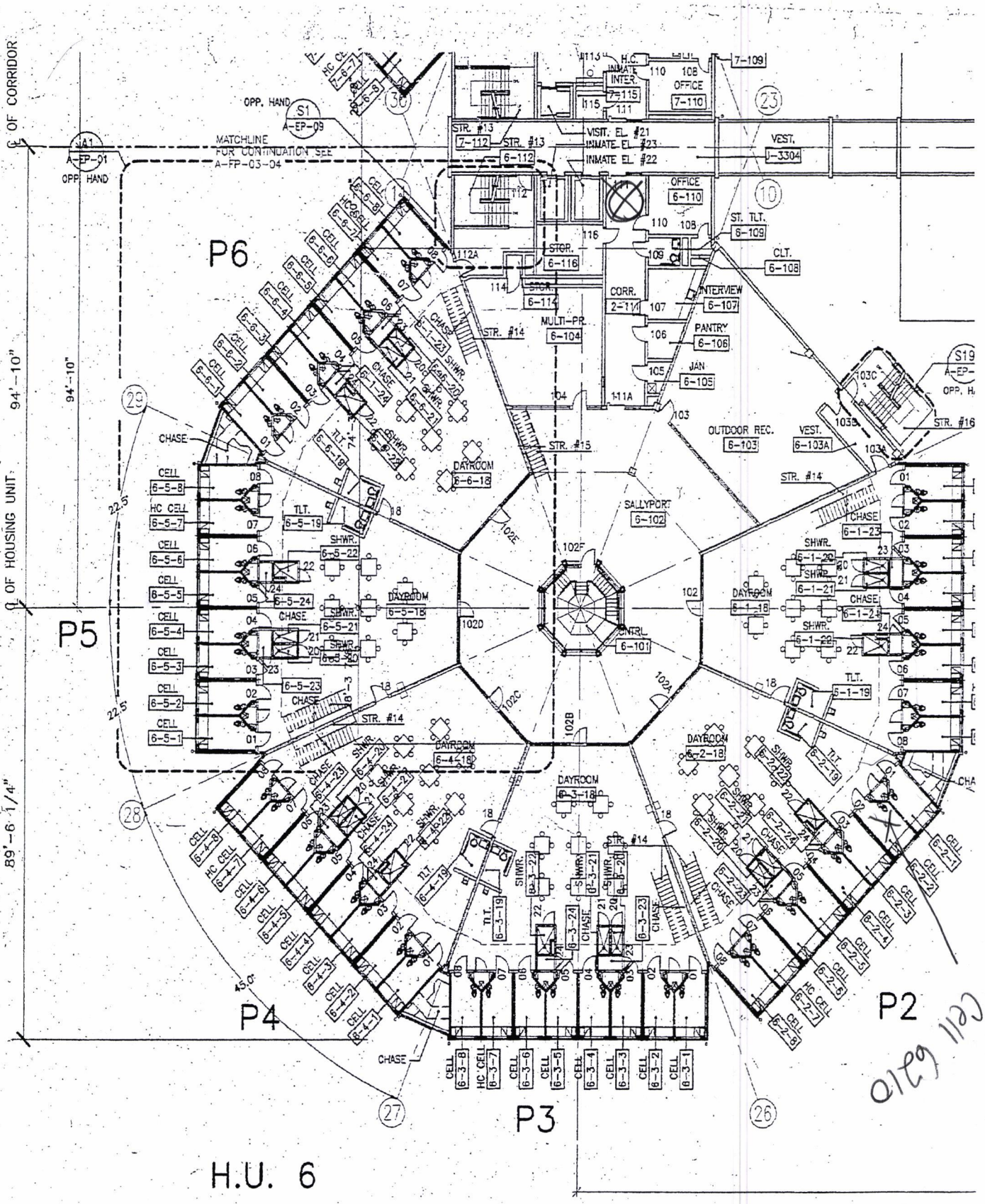

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONALD GROCHOWSKI, et al.,	)	
	)	
Plaintiffs,	)	Civ. Act. No. 1:14-cv-02586
	)	
v.	)	Plaintiffs' Brief in Support
	)	Of Plaintiffs' Motion For
CLAYTON COUNTY, GEORIGA, et al.,	)	Partial Summary Judgment
	)	Against The County
Defendants.	)	
	)	

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THE COUNTY

Plaintiffs bring claims pursuant to the Fourteenth Amendment Due Process Clause against Defendant County for systemic conditions of confinement that constitute grossly inadequate protection from harm by other detainees and a substantial risk of in-cell detainee-on-detainee assault within the eight double-celled housing units in the Clayton County Jail. Plaintiffs maintain that the challenged conditions lasted for years leading up to the assault on Grochowski on August 14, 2012, when the challenged conditions caused the assault on and killing of Grochowski by his cellmate. Grochowski's constitutional rights were deprived when he was confined within the challenged conditions even before the start of the assault by Brooks. See Bugge v. Roberts, 430 F. App'x 753, 760 n.7 (11th Cir.

2011). Because the challenged conditions proximately caused the assault on and death of Grochowski, damages are recoverable for those losses.

1. The Challenged Conditions Are Unconstitutional By Inadequately Protecting From A Substantial Risk of In-Cell Detainee-On-Detainee Assault

Pursuant to Bell v. Wolfish, 441 U.S. 520 (1979) there are three elements for a pretrial-conditions claim: (1) a condition of confinement, (2) that is not reasonably related to a legitimate goal of detention, and (3) a severity requirement that the condition imposes more than de minimis harm. 539-40 & n.21

A. The Challenged Jail Design And Classification Process Constitute A "Condition" Triggering The Objective Bell Standard.

i. Conditions Are Established By Widespread Practices.

In Bell double-celling and jail design were conditions of confinement. 441 U.S. 520, 541-43 (1979).[1] In Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996) (en banc) the Court extrapolated from Bell that 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. Plaintiffs' challenge to double-celling and the jail and door design preventing in-

[1] In Bell the district court found double-celling unconstitutional based on personal security and privacy, and the court of appeals affirmed based on the privacy concern. See Bell at 541-42. The Supreme Court reversed, finding no evidence that the lack of privacy and limited personal space established "genuine privations and hardship." Id. Nonetheless security issues arising from double-celling and jail design are a conditions issue.

cell observation establishes a conditions claim because the condition is pervasive and does not involve any jailer's acts or omissions.

Because Bell found double-celling was a "condition," and because Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) reaffirmed Bell and found that any intentional act, even use of a taser, triggers Bell's reasonably-related standard, Kingsley at 2472; Plaintiffs' challenge to double celling and jail design should be governed by the Bell test. This is confirmed even by the dissent in Kingsley:

> *Bell* endorsed this "reasonable relation" inference in the context of a challenge *to conditions of a confinement*—specifically, challenges to the State's policy of housing two people in each cell, and various security policies. The conditions in which pretrial detainees are held, and the security policies to which they are subject, are the result of considered deliberation by the authority imposing the detention. If those conditions and policies lack any reasonable relationship to a legitimate, nonpunitive goal, it is logical to infer a punitive intent.

Kingsley at 2478 (Scalia, Roberts, and Thomas dissenting) (citations omitted).

The other challenges are to (1) the classification process, (2) the under-funding and understaffing of guards who perform rounds, and (3) the combination of these including double-celling in a flawed jail design. The challenged conditions within Clayton County Jail are not episodic omissions as opposed generally applicable conditions for Bell's purposes as shown immediately below, at §ii-iii.

ii. Facts Showing That The Challenged Jail And Door Design Of The Multi-Celled Housing Units, And Underfunding-Understaffing Were Conditions Of Confinement.

The housing unit schematic (Johnson Dep. Ex. 5)[2] and the photos[3] show an octagon-shaped housing unit with a central control tower surrounded by a "sally port," the open concrete area between the tower and the wall of the six pods, with their dayroom of tables and their two tiers of eight cells, for a total of 96 cells per housing unit. Lee Dep. at 11. The distance from "the control tower to the front door of a cell" is about "70 to 80 feet." Joe Lee Dep. at 12: 11-15.[4]

The cells have "closed front doors," Southerland Dep. at 8:2-5, and a "small window" at most about six inches wide. Johnson Dep. at 10:9-11; Samuel Smith Dep. at 10:13-16; doc. 1-21 at 7 (picture of cell door). Officers cannot "see in a cell from the control tower," Tuggle dep. at 23:24-24:6, a fact confirmed by multiple

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[2] Undisputedly each of the eight housing units is designed in the same way.

[3] Dec. of George S. Pearle, with seven photographs:
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.

[4] When the cell doors are closed they are locked, and the cell doors can be remotely unlocked by the control tower guard. Johnson Dep. at 10:12-17.

officers.[5] Officer K. Brown says that when and an in-cell fight occurs, an officer "wouldn't know [about it] unless somebody said something." Dep. at 28.

Because there is no intercom or microphone in the cells linked to the tower,[6] the control tower guard cannot hear into the cells, the tower guard is 70-80 feet away, and there is a closed front door, a pod section wall bordered by the sally port, and a wall around the guard tower between the guard and the interior of the cell. See Jail photos, n.3 above. It is undisputed that from the control tower "you can't really hear" what's going on outside the tower or in the cells. Love Dep. at 12:4; see also Berg Rebuttal Report at 15 (must be "within the same pod ... to hear an inmate calling out from a sleeping cell").

It is undisputed that as a custom, rule and policy the detainees were locked in their cells from evening through the morning each day. See e.g. Doc. 1-20 p. 16 (post-incident investigation statement, that during the incident "we were in lock

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[5] 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." Johnson Dep. at 14:17-23. Tameika Smith confirmed you have to be within an "arm's length" to see in the whole cell. Dep. at 12:15-13:10. The "control tower officer" cannot "see in all of the cells." Tameika Smith Dep. at 19:21-23. From the control tower one cannot see into cell 6-2-10. Tameika Smith Dep. at 19:24-20:21.

[6] In each cell there is a buzzer or call-button but it does not allow the control tower guard to hear into the cell, Johnson Dep. 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. Johnson Dep. 22:5-18.

down as usual"); Tameika Smith Dep. at 29:6-7 (when responding to the incident, Grochowski and Brooks' cell door was locked close).

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, Johnson Dep. at 13:18-23; see also Daily Roster of 8/14/2012 (doc. 1-20 at 62), and the long-term "policy" was for hourly rounds when detainees were in their cells. Johnson Dep. at 13:24-14:16; see also Cash Dep. at 33 (round frequency policy has "been [in] place since we moved into the jail"). As discussed below, p.24-25, underfunding-understaffing was a pervasive condition at the Jail from the opening through 2012.

In 2002 the Jail had 1,100 inmates, but from 2010-2012 average monthly population was 1,500-1,900. See Monthly Reports (Sowell Dep. Ex. 15); Clayton News Daily Feb. 18, 2011 (Kimbrough Dep. Ex. 18). Almost every inmate housed in the eight housing units was multi-celled, with two or three inmates per cell, and double celling was a "common practice" "from the day we moved in" to the Jail. Southerland Dep. at 6:20-7:1.[7]

[7] Johnson Dep. at 25:9-17 ("[I]f an inmate was a single person in a cell, it was because his roommate left or the people who were assigned to the cell left and they just happened to be there. We didn't particularly assign a single person to a cell."). For example, Grochowski's housing unit on August 14, 2012, averaged 1.96 inmates per cell. 175 of the 188 inmates in the housing unit were multi-celled, and out of a total of 96 cells, 83 cells housed two or three inmates. Doc. 1-20 at 64-69.

iii. Facts Showing That The Jail's Classification Process Celled Non-Violent Detainees With Detainees Who Had A Prior History Of Assaults And Mental or Emotional Issues.

The policy or practice for classification and housing was to classify detainees with a violent/assaultive felony on their criminal history as maximum (who are assigned a red suit) and everyone else as medium (orange suit), and then everyone is double celled with the other detainees in their classification.

The classification officers separated into maximum and medium based only on review of their criminal record, Hewitt Dep. at 7:9-19, without speaking to the detainee. Baker Dep. at 6-7; Sheriff Kimbrough Dep. at 25; Expert Sweeney Dep. p. 114:7-13. The classification officer reviews the criminal history and follows the instructions on a classification tree (Baker Dep. Ex. 1), to determine maximum or medium classification, Baker Dep. at 10:20-11:3, by classifying a detainee as maximum if they had a current or prior "Violent/Assaultive Felony" or had a history of escape, with everyone else being classified as medium. Baker Dep. Ex. 1; Baker Dep. at 14:18-23. In other words, the practice omits to consider violent/assaultive misdemeanors on detainees' criminal history, resulting in the housing of detainees with record of assault with non-violent detainees.

After the classification into medium and maximum, the housing officers determine a detainee's cell placement, based solely on their med-max classification and cell availability without any further "refinement." Baker Dep. at 18 & 20-21;

Maj. Cash Dep. at 20; McKibbins Dep. at 5:18-6:22 (housing officers "had nothing to do with classification"). The housing officers never see or use the criminal history information relied on by classification. Baker Dep. at 16-17.

When a detainee is first brought to jail there is a medical screening, done by an employee of the medical contractor, CorrectHealth, see e.g. Brooks' Medical Intake (doc. no. 1-21 at 23-27), which includes a cursory face-to-face evaluation of observable conditions and asking the detainee to self-report history of violence and mental health history. See e.g. Brooks' Medical Intake Form (doc. no. 1-21 at 25).

No information obtained by the medical intake process was passed on to the classification officers. Hewitt Dep. at 9:11-10:1. The medical intake process has no involvement in determining classification or whether potential cellmates are compatible for safe housing, and other than placing detainees in the medical infirmary, medical intake personnel "had no say in where they were placed or which housing unit." Rose Dep. p.22-23.

B. The Purely Objective Standard Applies To The Challenged Conditions -- As Opposed to the Subjective Standard under Farmer -- And The Challenged Conditions Fail The Objective Test, Because of Bell and Entity Liability Law.

i. The Solely Objective Bell Test Applies In The Eleventh Circuit, Because Plaintiffs Challenge Conditions Of Confinement Which Are Deliberately Imposed.

Circuit case law which is binding holds 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)[8] 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).[9]

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.[10]

ii. Alternatively In Eight Amendment Conditions Case Law, An Entity Can Be Liable Under An Objective Reasonableness Standard, Without Proof That The Entity Or Its Agents Were Subjectively Deliberately Indifferent.

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[8] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on 30 September 1981.

Jones is overruled on other grounds by Int'l Woodworkers of Am., AFL-CIO & its Local No. 5-376 v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986).

[9] Jones is binding law because it has never been overruled by the Eleventh Circuit en banc (nor has it been contradicted by the Supreme Court). See Marsh v. Butler Cnty., Ala., 268 F.3d 1014 1024 n.5 (11th Cir.2001) (en banc) ("we do not consider or decide en banc whether or how the Eighth and Fourteenth Amendment standards differ."); United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998).

[10] The Ninth and Second Circuits agree that Kingsley shows that Bell's objective test, as opposed to Farmer's subjective standard, applies to pretrial detainees' claims. See Castro v. of Los Angeles, 833 F.3d 1060, 1069-70 (9th Cir. 2016) (en banc); Darnell v. Pineiro, 849 F.3d 17, 35–36 (2nd Cir. 2017).

Even in an Eighth Amendment case, an entity can be directly liable without proof of subjective intent because entities lack mental states and therefore an objective reasonableness or objective deliberate indifference standard applies.[11]

Although the Eleventh Circuit has not addressed this specific entity liability issue, district courts have applied an objective reasonableness test to entity liability in Eighth Amendment conditions cases.[12]

iii. The Challenged Conditions Of Jail Design Preventing In-Cell Observation And Classification That Omits To Consider Assaultiveness Fail Bell's Objective Test.

Although Defendants argue that detainees' privacy justifies the challenged jail design preventing visibility into cell, Plaintiffs' expert Michael Berg states that "[w]hile privacy concerns are important, they do no[t] supersede safety and security." Berg. Rebuttal Rep. at 10. Defendants' position was rejected in Caldwell v. Bentley, 2015 U.S. Dist. LEXIS 31833 (M.D. Ala. Feb. 11, 2015) which found that female guards conducting rounds may view potentially nude male inmates

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[11] See Farmer v. Brennan, 511 U.S. 825 (1994) ("'[n]eedless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official"); Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1248-49 (9th Cir. 2016) (policy claim of shackling women during labor against an entity should be evaluated under an objective deliberate indifference standard, similar to Monell and its progeny).

[12] Vinson v. Clarke Cnty., Ala., 10 F. Supp. 2d 1282, 1294 & 1300-01 (S.D. Ala. 1998) (Eighth Amendment claim directly against County is determined by an objective standard); Buckley v. Barbour Cnty., Ala., 624 F. Supp. 2d 1335, 1345 (M.D. Ala. 2008) (same); Fields v. Prison Health Servs., No. 2:09-cv-529-FtM-29DNF, 2011 U.S. Dist. LEXIS 99244, at *28-29 (M.D. Fla. Sep. 2, 2011) (same).

because privacy rights of inmates are limited by the prison safety and security interest. Caldwell at *88-96.[13]

Defendants may also argue that the money saved by multi-celling or by underfunding-understaffing rounds is a legitimate penological interest, but "the cost of protecting a constitutional right cannot justify its total denial." Bounds v. Smith, 430 U.S. 817, 825 (1977); Lareau v. Manson, 651 F.2d 96, 104 (2d Cir. 1981) (double celling out of observation of guards violated Bell because the "only conceivable purpose" double celling serves is a "basically economic motive").

Because neither privacy nor saving money is a legitimate penological goal that is reasonably related to the challenged conditions (and/or the conditions are excessive in relation to those goals), and because the challenged conditions are contrary to the jail's fundamental objective of safely "ensuring the detainee's presence at trial;" double-celling and understaffing within Clayton County Jail fail the Bell test. See Bell at n.22 ("[S]ecurity measures may directly serve the Government's interest in ensuring the detainee's presence at trial.").

There is no legitimate penological reason for the challenged classification process, which fails to ensure the detainee's safe presence at trial, and is therefore

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[13] See Bonner v. Chambers Cty., 2007 U.S. Dist. LEXIS 54550, at *42 (M.D. Ala. July 26, 2007) (Eleventh Circuit law regarding "an inmate's right to bodily privacy has not been expanded beyond ... compelled nudity and masturbation").

The reasoning throughout Bell as to conditions including room searches and body cavity searches is that the limited privacy interest had to yield to security.

an excessive response to any alleged legitimate penological purpose that Defendants may assert justified their classification process.

C. The Challenged Conditions Demonstrate An Unconstitutionally Severe Risk of Injury By The Serious Risk They Pose.

Whether under the Eighth or Fourteenth Amendment the Constitution has been applied to find a violation when jail or prison conditions pose an unreasonable or unnecessarily substantial risk of harm. See Bell at n. 21 (harm must be more than "de minimis"); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("unnecessary ... infliction of pain" such as "those that are 'totally without penological justification.'") (citations omitted).[14]

i. The Following Circuit Cases Reflect Conditions That Established A Constitutional Violation, Similar To Those Found In Grochowskis' Case.

The Second, Seventh, Eighth, and Tenth Circuits agree that housing detainees together without an ability for guards to detect assaults is a constitutional violation under Bell or the Eighth Amendment standard.[15] In McCreary v. Parker,

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[14] Rhodes found that double-celling is not *per se* unconstitutional, because Plaintiffs failed to present any evidence that double-celling at the prison in question caused any assaults. Rhodes, at 348. Moreover, there was no challenge to the jail design, to understaffing, nor to classification, and "in all of the cells ... one wall consists of bars through which the inmates can be seen." Rhodes, at 341.

[15] See Lareau v. Manson, 651 F.2d 96, 108 & n.11 (2d Cir. 1981) ("double cells from which [detainees] can contact guards only with the greatest difficulty" and "the inability of the guard to view the interior of the cells from his station inside the bubble" was a severe risk of harm); Hart v. Sheahan, 396 F.3d 887, 894 (7th Cir. 2005) (double celling "out of sight and hearing of guards" during

456 F. App'x 790, 2012 WL 205925 (11th Cir. Jan. 25, 2012) the Panel found plausible a claim against a prison supervisor, who due to overcrowding "instituted a policy of double-celling inmates who were in disciplinary or administrative holding" that resulted in the attack on Plaintiff by his cellmate, because the supervisor knew that overcrowding resulted in dangerous conditions and knew of "the increasing frequency of inmate-on-inmate violence" but nonetheless continued his double-celling policy. McCreary at *2-3.[16]

In Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) the Constitution was violated by assaults caused in part by lack of classification "resulting in the intermingling of inmates convicted of aggravated violent crimes with those who are first offenders or convicted of nonviolent crimes." Gates at 1308.[17]

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lockdown one weekend a month); Jensen v. Clarke, 94 F.3d 1191, 1196-98 (8th Cir. 1996) (double-celling posed "a substantial risk of serious harm to all inmates in the form of violence from cellmates," shown by an increase in assaults corresponding to an increase in double-celling, and "anecdotal evidence" that "the violence institution wide carried over into the double cells"); Lopez v. LeMaster, 172 F.3d 756,762 (10th Cir.1999) (understaffing prevented continuous observation, and "there was no TV monitor, no guard in sight, and no way to call for help").

[16] See generally Jenkins v. DeKalb Cty., 528 F. Supp. 2d 1329, 1338 (N.D. Ga. 2007) (Thrash, J.) (Although not the dispositive issue the Court found a substantial risk of serious injury caused by double-celling a violent cellmate with the plaintiff's decedent. "See Johnson v. California, 543 U.S. 499, 526-527 (2005) (Thomas, J., dissenting) ('[D]ouble cells are especially dangerous. ... [A]nd the tightly confined, private conditions of cells hazard even more violence.').").

[17] See also Marsh v. Butler Cnty., Ala., 268 F.3d 1014, 1029 (11th Cir. 2001) (failure to separate non-violent inmates from violent inmates); 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

ii. Facts Showing The Severity Of The Danger From Multi-celling Without Continuous Observation And In-Cell Assaults.

Based on the jail's disciplinary records, between 2010 and 2012 there were at minimum 115 in-cell assaults, which was at least about 35% to 40% of the total number of assaults (both in and out of cells). See Batson Dec. 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." Sweeney Dep. at 135.

Major Cash admits that under the challenged conditions at the Jail there is no way to prevent in-cell assaults. She is asked whether, after an in-cell detainee-on-detainee assault, there is an investigation "that addresses how to have prevented the assault in the first place," and Major Cash explains in relevant part: "*there's not a practice to prevent it because there's not. There's no way to do that.*" Dep. at 31:23-32:10 (emphasis added).

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ill individuals as far as reasonably possible."); Richko v. Wayne Cty., Mich., 819 F.3d 907, at 915-16 & 919-20 (6th Cir. 2016) ("the risk to [inmate] Horvath of being housed with and attacked by an inmate who had recently been arrested for violent assault and had a history of serious mental illness was sufficient to fulfill the objective component of" the constitutional analysis); 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.").

Defendants, their agents, and their expert admitted that in-cell assaults can result in "serious" injury.[18] Plaintiffs' expert agrees that double-celling within the challenged jail design and understaffing prevents continuous observation and creates unsafe conditions. See Berg Expert Report at 7,10; Berg Dep. at 75:2-24. There should be an additional one to two guards per housing unit to allow for continuous rounds. Berg Expert Report at 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 inmates." Jail Design Guide at p.308. These concerns were obvious to the County and Sheriff before building the current Jail and they remain true today.

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

Applicable Georgia Jail standards require guards to be able to observe detainee living areas or be contacted by detainees at all times.[19]

The subset of detainees who were double-celled in the Jail were housed in a condition posing a substantial risk of serious injury for no legitimate penological purpose, because there was no ability for continuous observation.

iii. Facts Showing The Classification Process Was Unreasonable And Grossly Inadequate, Posing A Substantial Risk Of Harm of Detainees Being Double-Celled With Assaultive And Unstable Detainees.

Additionally, and in combination with the challenged facility and staffing conditions, the challenged classification process constituted a severe deprivation, and created a substantial risk of serious injuries for the class or subset of detainees who were housed with detainees with a history of assault or recognizable mental or emotional issues.

The classification process did not separate detainees with violent/assaultive misdemeanors on their criminal history, from detainees with a non-violent criminal history, causing them to be housed together. See citations above, at § 1 (A) (iii). Defendant's expert admits that the most important distinction for a classification system is between "those who have demonstrated a propensity for violence and

[19] The 2008 Georgia Jail Standard, §23.17, (Sweeney Dep. Ex. 27): "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." Id. at § 23.22

those who have not, based on their charges and their history." Sweeney Dep. p. 118. Accord Plaintiffs' Rebuttal Expert Report at 2-3. The Jail's SOP's provide: "Classification Section Personnel shall review" the criminal charges for a "nonviolent Misdemeanor." Jail SOP no. 3.01 p.2. A Jail's "own internal policies" can provide evidence of substantial risk of injury when there is a practice of violating the written policy.[20]

As discussed above, at § 1 (A) (iii), the classification process did not rely on a face-to-face evaluation of detainees and their demeanor to detect low mental functioning and emotional instability, which causes a substantial risk for incompatibility for double celling. Berg's Expert Report at 8. Defendants' expert Sweeney does not dispute that there should be a face-to-face evaluation for classification and housing purposes. Sweeney's Expert Report (doc. 125-1) at 5. The Jail's own S.O.P's require a face-to-face evaluation of a detainee's mental or emotional state for purposes of classification and determining "[i]f the inmate

[20] 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.").

appears to be violent or nonviolent ... [and] appears to be emotionally stable." Jail SOP no. 3.01 p.2.[21]

The classification process was also inadequate because it did not take into consideration Brooks' youth nor the troublesome behavior reflected by Brooks' arrest and criminal history. See Berg Expert Report at 8-9.

In combination the challenged conditions involving the facility, staffing, and classification as applied to the subset of detainees who were double-celled with inadequately classified detainees, i.e. those with a history of assaults or recognizable emotional or mental issues, created a substantial risk of serious injury from in-cell assault. Moreover, as applied to the subset of the hundreds of detainees who were double-celled with assaultive detainees who did assault them, see Batson Dec., the challenged conditions in combination constituted a substantial risk of serious injury from in-cell assault.

2. The Unconstitutional Conditions Caused The Assault and Death.

As explained in LaMarca v. Turner, 995 F.2d 1526, (11th Cir. 1993), a prison conditions case, the causation requirement between condition and harm is

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[21] The classification process was inadequate because the face-to-face evaluation that did occur during the medical intake, relied on a detainee's unverified self-report of whether he had a history of violent behavior, without checking or cross-referencing the detainee's readily available criminal history. Defendant's expert admits that it is improper to rely on an inmate's self-report about prior assault because it needs to be verified via the criminal history. Sweeney Dep. at 55. Accord Plaintiff's Expert Report at 12.

straightforward and "the defendant is 'precluded from contending that the unconstitutional condition was not at least a proximate cause of . . . injuries' that arose from that condition." LaMarca at 1538 (citation omitted).

A. The Challenged Jail Design And Understaffing Caused The Assault.

If the jail had single-celled detainees, then causation is straightforward, because Brooks would not have been celled with Grochowski, and there would have been no assault. If the jail design and layout including the cell windows allowed for continuous observation to the cell interior from the guard tower, or if the jail had been staffed for continuous rounds, then Grochowski would not have been assaulted. Plaintiff's Expert says that continuous rounds would "more likely than not" have prevented the assault on Grochowski. Berg Expert Report at 8.

B. Inadequate Classification Process Caused The Assault

The challenged unconstitutional classification condition, as applied to Brooks and Grochowski, caused them to be double celled together, causing the assault and death. If the challenged classification condition had not unconstitutionally disregarded prior violent misdemeanors and face-to-face evaluation for emotional instability and low mental functioning, then Brooks and Grochowski would not have been double-celled, which would prevent the assault.

The record of Grochowski, 57 years old then, reflects no assaultive tendencies. See Baker Dep. Ex. 2 at 2-31; Sweeney Dep. at 119:6-10 (conceding).

Brooks, who became an adult in 2009, and whose juvenile record was not available, had a criminal record beginning with a 2009 arrest for misdemeanor battery, resulting in a conviction for "affray (fighting)." Doc. 1-21 at 53-54. Brooks was arrest in January 2012 for fraud, felony burglary, and resisting, that resulted in a conviction. Doc. 1-21 at 56-57. While in Henry County Jail Brooks was charged for "affray (fighting)" on May 29, 2012. Doc. 1-21 at 53-54.[22] Brooks was also arrested July 31, 2012 for theft by receiving, false name, suspended license, under a Florida fugitive warrant. Doc. 1-21 at 72, 12, 40.

Grochowski and Brooks were both classified as medium pursuant to the customary but deficient classification process, because neither had a prior or current violent/assaultive felony. Baker Dep. at 14, 19-20; Baker Dep. Ex. 2 & 4. Consideration of misdemeanor assaults would have caused Brooks and Grochowski to be housed separately. Pursuant to the challenged classification process, described above, at § 1 (A) (iii), there was no face-to-face evaluation of

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[22] While Brooks was in Jail in Henry County in late May he demonstrated he was unsuited to be double-celled by disruptive, emotionally unstable behavior causing an in-cell fight. Had there been a face-to-face interview with access to criminal records by the official the "affray" would have been considered and the officer would likely have learned of the circumstances of the affray.

In an argument with his cellmate about in-cell alone time the records show that Brooks escalated the argument, spitting in his cell mate's face and throwing a cup at him, resulting in a serious fight, and in the cellmate and other reporting that Brooks was "'throwed off' describing Brooks' mental state." See Henry County Incident Report at p.5 of 15.

Brooks and therefore Brooks was placed in Grochowski's cell "for no specific reason" by Officer McKibbins. Dep. at 5-6. An adequate face-to-face interview with a corrections officer would have prevented the Brooks from being housed with Grochowski. See Berg Report at 8-9 (relying on Brooks' videos after assault).

On August 14, while Brooks and Grochowski were in their double-cell together, Brooks' assaultive tendencies and emotional instability caused him to start a fight over a piece of candy with Grochowski and caused the death of Grochowski. See Waites Dep. at 7-20 (discussing report, doc. 1-20 at 3-13).

3. Clayton County Is Liable Under Monell And Its Progeny.

The County is liable for the challenged conditions of the facility, lack of possible continuous in-cell observation by deliberate design, built and sized to double cell, dangerous classification driven by jail sizing to double cell, underfunding causing understaffing and housing unit closings, that culminate in an excessive and substantial risk of undetected, serious in-cell assaults, because the challenged conditions were caused by Clayton County's official policies or persistent and widespread practice or customs. Alternatively or additionally the County was objectively deliberately indifferent to and had actual or constructive notice of, the challenged unconstitutional jail conditions. Monell's requirement of "a direct causal link between the municipal action and the deprivation of federal rights" Fields v. Corizon Health, Inc., 490 F. App'x 174, 185 (11th Cir. 2012), is

satisfied because the County's policies and practices, the double-celled jail-design and underfunding-understaffing, are the same as or closely related to the challenged unconstitutional jail conditions posing a severe risk of in-cell assault.

Because the County had three jail-related duties – construction and maintenance of the "jail and "cells" (O.C.G.A. §36-9-5(a)-(b)), "reasonable fund[ing]" of the Sheriff's department (Op. and Order (doc. 57) at 9), and funding and contracting with CorrectHealth, the County can be held responsible for the challenged conditions.[23]

A. The Challenged Conditions Were County Policies And Practices.

There is "no meaningful difference" between a "condition" for Bell's purposes and a policy or custom for Monell's purposes. Duvall v. Dallas Cnty., *Tex.*, 631 F.3d 203, 208 (5th Cir. 2011). The condition-evidence above of jail design, underfunding-understaffing, and double-celling, establishes a Monell practice because they are "persistent" and "widespread." Church v. City of Huntsville, 30 F.3d 1332, 1345 (11th Cir. 1994).

[23] Plaintiffs are preserving, for response to summary judgment, arguments that (1) the County is liable, pursuant to its funding and contracting duties, for CorrectHealth's challenged policy or practice of inadequate classification, and (2) the County is responsible for medical related conditions, maintaining the inmate, and medical care that identifies and treats conditions related to assaultiveness.

The challenged condition of the jail design and double celling is also an official policy under Monell.[24] Before construction of the jail in 2000, then-Sheriff Tuggle and agents of the County Commission "discussed" single celling, but decided against it in order to save the money, according to Tuggle who served as Sheriff from 1997 through 2004. Tuggle Dep. at 22:3-16; id. at 25:9-17. "Decisions" about the jail design "including the doors and certain equipment" were made by "stakeholders from the County" in discussion with the architect and contractor. See Joe Lee Dep. at 8: 1-5.

The Jail was also underfunded-understaffed, closing a housing unit at the relevant time which prevented single-celling of troublesome inmates and adequate staff and rounds and constitutes a Monell policy. Anderson v. City of Atlanta, 778 F.2d 678 (11th Cir. 1985).

B. Notice Showing Clayton County's Culpability

The Eleventh Circuit explains "that a municipality has made a deliberate choice among alternative courses of action, [if] its policymakers ... had 'actual or constructive notice that the particular omission is substantially certain to result in

[24] Accord Castro v. Cty. of L.A., 797 F.3d 654, 671 (9th Cir. 2015) (Designing a jail is "'a deliberate choice . . . from among various alternatives.' Construction projects ... choices based on ... functionality, budget, and other factors. ... [t]he municipality's governing body—or a committee that it appoints to act in its stead—reviews bids, considers designs, and ultimately approves a plan for the facility and allocates funds for its construction.") (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).

the violation of the constitutional rights of their citizens.'" Young v. City of Augusta ex rel. DeVaney, 59 F.3d 1160, 1172 (11th Cir. 1995).

Kimbell v. Clayton Cty., No. 1:03-CV-2910-JEC, 2005 U.S. Dist. LEXIS 48698 (N.D. Ga. Sep. 27, 2005), at *38-41, put the County on notice that they had a practice of under-funding and understaffing the Jail based on letters from Sheriff Tuggle from 2000-2004. His letters to the County (Tuggle Dep. Ex. 17) confronted short-staffing causing housing unit closures, which eliminated classification and housing "in a way most courts of review consider acceptable," putting "staff, inmates or the public at risk." Dep. Ex. 17 (Letter dated May 2, 2003).

In 2011 and early 2012 Defendant Sheriff told the Commission one housing unit was closed "due to safety concerns because of understaffing" and requested more staff, which had not been increased since 2000. February 18, 2011 Clayton News Daily (Kimbrough Dep. Ex. 18); February 10, 2012 Clayton News Daily (Kimbrough Dep. Ex 17). A housing unit remained closed through the August 2012 assault. See Jail Roster (doc. 1-20 at 62).

A County website says to single cell more "troublesome" inmates with an "ideal" jail capacity of 1,544. Kimbrough Dep. Ex. 16; p.7:8-10. Similarly, the Jail's SOP's call for a Security Segregation unit for heightened supervision if "[t]he inmate has or is displaying violent behavior." SOP NO. 3.03. Becuase of the

challenged condition of double-celling all of the housing units were double-celled and there was no security segregation unit for assaultive or troublesome inmates.

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.

Am. Compl. (doc. 73) at ¶42; County's Answer (doc. 75) at ¶42. Notice is also shown to Commissioners by the obviousness of the problems and risks created by design and underfunding.[25]

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[25] It is obvious that an officer who cannot see into the cell cannot respond to an in-cell problem. Tuggle Dep. at 24-25. "[O]bvious" that detainees will get into fights if allowed. Id. at 24:7-14; Sowell Dep. at 12:9-12; Samuel Smith Dep. at 18:21-23. It is "obvious" that "a person can get hurt pretty seriously in a fight." Sowell Dep. at 12:13-15. It is likely that when attacked in-cell, a detainee will "fight or flight" and will foreseeably respond with force. Cash Dep. at 34:4-35:6. See also Berg Expert Rep. at 4 & 7 & 9.

Respectfully submitted this 18th day of May, 2018.

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I certify that this brief was prepared in word in 14 point, Times New Roman font.

/s/ John P. Batson
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Ga. Bar No. 042150
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONALD GROCHOWSKI, et al.,	)	
	)	
Plaintiffs,	)	Civ. Act. No. 1:14-cv-02586
	)	
v.	)	
	)	
CLAYTON COUNTY, GEORGIA, et al.,	)	
	)	
Defendants.	)	
	)	

MICHAEL A. BERG
RESPONSE TO EDWARD SWEENEY REPORT

Here within is my response to the statements made by Edward Sweeney in his report and deposition regarding the Donald Grochowski matter.

EDWARD SWEENEY JANUARY 16, 2018 REPORT

Classification

- Mr. Sweeney states that NCCHC (National Correctional on Correctional Health Care Standards) and ACA (American Correctional Association Standards) are "High Water" marks for the correctional industry. He also states that these standards are not the only measure of constitutionality for corrections.
    - Comment: NCCHC and ACA standards are more than "High Water" marks – they are considered the best practices for the corrections business. Whether accredited or not, corrections agencies should strive to achieve as many of these standards as possible. Further, the constitutionality of any operation is certainly more likely when these standards are strived for and hopefully achieved.

- Mr. Sweeney indicates that unless medical imposes housing restrictions for an inmate, it is acceptable for housing officers to make cell assignments for inmates similarly classified.

    - Comment: This is only true if the Classification section has done an acceptable evaluation of the inmates involved and has not imposed any housing restrictions on the inmate/s in question. In Grochowski, this was not the case. The classification and housing assignment as to Grochowski and Brooks occurred only by a Classification officer applying the Initial Classification Form which only distinguishes classifications based on whether the criminal record showed a felony assaultive charge as opposed to misdemeanor or non-assaultive charges, with other relevant factors not being considered. Inadequate to say the least. Housing unit correctional staff should not be making cell assignments. A Classification unit is a crucial part of any facility's effort in providing a safe and secure operation. Assaultive behavior has to be a major consideration factor. Brooks had a well-known assaultive history in roughly a three-year period. Mr. Sweeney contradicts himself when he says correctional officers do not have access to criminal history information, classification files or medical considerations – but then in the same report indicates that these same officers can make cell assignments. Cell assignments and inmate movement should happen only at the direction of Classification. Sweeney also suggests that an Objective Classification system takes the subjectivity out of housing assignments, but then states that housing unit personnel can make cell assignments without having all needed inmate information – subjective – most assuredly. It has been reported in numerous articles and studies pertaining to effective classification systems (to include validated systems) that a "subjective" classification system is not the accepted standard or practice. The articles are mentioned below.

- Mr. Sweeney indicates that the Clayton County Jail classification process was acceptable.

    - Comment: Not at all true. Grochowski and Brooks were only considered by Classification by reviewing NCIC and GCIC criminal histories. Sweeney states that Clayton County's classification system was acceptable even though Stability Factors were not considered. In all objective classification systems, Stability Factors refer to age, marital status, employment, etc. Mr. Sweeney errs here again because

if Clayton County only considered whether the criminal records of Brooks or Grochowski reflected a violent felony were Brooks and Grochowski were not compatible cell mates – the criminal history showed Brooks was violent and Grochowski was non-violent.

- Mr. Sweeney writes that the Clayton County, Georgia Classification System was adequate.

    - Comment: This is not at all true. If Clayton County had a true Objective Classification System, they would have considered more than criminal history, violent or non-violent. The Classification Form or instrument (The Classification Tree or The Triangle) used by Clayton County is not nearly as comprehensive as those used in 2012.Additionally, Clayton County did not address even the factors listed on the form, under the heading "High Risk Flags" and "Special Condition Flags." Information that was known and clearly available such as Brooks' assaultive behavior given his criminal record, his age, and his demeanor or answers during a face to face interview, should have been considered and impacted the classification and housing assignment of Brooks.

- Mr. Sweeney states that Classification "stabilization factors" should only used to downgrade classification level determinations for a specific inmate.

    - Comment: This is not at all accurate. Stabilization factors should be used to accurately classify an inmate upward or downward as deemed appropriate by objective measures, but more importantly, to ensure the safety for all concerned.

- Mr. Sweeney also states that the stabilization factor of "age" is only considered if it triggers a protective custody, as if to say the only situation in which age is a factor is when a youthful, vulnerable offender may be housed with an adult. Sweeney indicates that for Brooks and Grochowski, age did not trigger this concern. Sweeney further states that my opinion about Brooks being a threat to his cell mate is wrong and the reverse (Grochowski being a threat to Brooks) was more accurate. Sweeney also states that "many larger systems also try to ensure that inmates are not housed by such characteristics such as age and race."

    - Comment: Once again, Mr. Sweeney is wrong. For systems that use an objective Classification system, youthful offenders are always

> considered more aggressive or dangerous and unpredictable than inmates of Grochowski's age. Further, systems, large or small, that use objective classification consider "age" an extremely important factor for housing considerations.

In support of my position on the Objective Jail Classification System, I offer the following nationally recognized publications pertaining to the utilization of an Objective Jail Classification System:

- National Institution of Corrections; Objective Jail Classification Systems: A Guide for Jail Administrators
- Texas Department of Criminal Justice, Correctional Institutions Division; The Advantages of an Objective Classification System
- Northpointe, Institute for Public Management, Inc.; Classification Implementation Manual for Smaller Jails
- Corrections.com; A look at Subjective and Objective Classification
- The National Sheriff's Association; Jail Classification and Discipline
- National Institution of Corrections; Internal Prison Classification Systems, Case Studies in Their Development and Implementation
- National Institution of Corrections; Comprehensive Objective Prison Classification, Participant Manual
- National Institution of Corrections; Objective Prison Classification, A Guide for Correctional Agencies
- National Institution of Corrections; Classification of High-Risk and Special Management Prisoners, A National Assessment of Current Practices
- Native American and Alaskan Technical Assistance Project; Project Guide: Objective Classification Analysis

As an example, some of the language found in these documents includes:

National Institution of Corrections; Objective Jail Classification Systems: A Guide for Jail Administrators:

> "Initial Custody Assessment (Classification)
>
> Each jail should determine the factors used to establish an inmate's most appropriate custody level, or classification. The most common factors used are:
>
> - Severity of current charges/convictions;

- Serious offense history;
- Escape history;
- Institutional disciplinary history;
- Prior felony convictions;
- Alcohol/drug abuse;
- Stability factors (e.g., age, employment, length of residence)."

Note: Age is one of the stability factors and is considered extremely important. Clayton County and Mr. Sweeney did not consider it an important factor. In the same document it states:

> "Factors that Drive the Initial Classification Instrument
>
> The stability factors are also significantly related to the custody rating, but a higher stability score increases the likelihood of a lower custody designation."

In the *Texas Department of Criminal Justice* document it is stated:

> "Regardless of its size and complexity, a jail's primary responsibility is to safely and securely detain all individuals remanded to its custody. Classification is an essential management tool for performing this function. By definition, classification is the process of placing things or people into classes according to some rational idea or plan. A good system of classifying inmates will reduce escapes and escape attempts, suicides and suicide attempts, the unnecessary incarceration of non-threatening prisoners, and unwarranted inmate-on-inmate assaults. All of these outcomes conserve valuable resources by reducing expenditures for legal fees and court costs, overtime pay, and medical expenses."
>
> and
>
> "Objective inmate classification contributes to efficient jail operations. Information about the inmate is collected and a program is developed based upon custodial requirements and the inmate's needs. An orderly method is furnished for assessing the varied needs and requirements of each inmate, from commitment to release."
>
> and

> "When conducting a reassessment, several considerations must be kept in mind. Since the original classification was based on objective information that is recognized and accepted by the courts, the reassessment must be an extension of the initial or primary classification. To do this, the reassessment should consider all of the objective criteria that was used during the first assessment in addition to any new information that may be available either due to the period of time that has elapsed since the last classification or by an incident or status change triggering the review."

In the Northpointe document, *Classification Implementation Manual for Small Jails*, it is stated:

> **"Jail administrators are increasingly aware that correct classification is a powerful means of avoiding public embarrassment, maintaining good public relations, and avoiding damaging litigation (NIC, 1985) and that erroneous or careless classification can produce public relations disasters.** Classification procedures should provide a paper trail that simplifies the ability to demonstrate the degree to which staff followed official procedures."
>
> and
>
> "Conversely, if a jail adopts OJC and then fails to follow its own procedures, it again becomes more vulnerable to litigation. Weak or partial implementation may be a particular challenge for small jails because of inadequate training, staffing, and resources. Managers of small jails can help reduce liability by taking the following actions:
>
> 1. Maintain a current awareness of court decisions regarding classification;
>
> 2. Maintain a vigilant and proactive "problem identifying" style using appropriate monitoring and supervision of classification operations so that deficiencies or problems are quickly identified and solved. This relies on a systematic process to identify problems and develop plans to address them;
>
> 3. Maintain an up-to-date policy and procedure manual that specifies standardized OJC procedures for staff to follow; and

4. Maintain and implement adequate staff training in OJC and use supervision
procedures to maintain the skills and competency of staff."

and

"The courts have identified objective classification as a way of ensuring consistent and equitable placements for both housing and program access (Gettinger, 1982). The high over classification error rate of subjective classification is simply more likely to lead to highly inconsistent decisions. Invalid classification methods invariably undermine consistency, fairness, and equity. The continuing use of informal and oversimplified methods of classification and untrained staff are both likely to produce errors of classification that may undermine equity and fairness."

and

"As noted earlier, the courts identified classification as "a prerequisite for the rational allocation of whatever program opportunities exist within the institution." Classification is also at the core of rational resource allocation. Correct matching of inmates to services (vis á vis security level, housing assignments, treatment programs, etc.) is the foundation of efficient resource allocation."

and

"All "keep-separate" decisions should be driven by information collected by classification staff during the initial classification process. Safety is a major priority in all institutional classifications. Failure to separate predators from victim types may result in violent victimization, an unsafe environment, anxiety, and lawsuits. Classification must be carefully linked to the differential supervision of the more dangerous inmates at different custody levels. Suicide screening procedures similarly attempt to identify the high suicide risk and provide appropriate surveillance and treatment. The courts have seen classification as a guarantor of the right to be protected from violent assault and the fear of violence (Tonry, 1987). Reducing fear and anxiety relies on the ability of classification to produce valid separations of inmates at different risk levels. Classification thus plays a role in producing an orderly, safe, predictable, and controlled environment, which should reduce anxiety despite the presence of dangerous persons."

and

"The starting point for coping with such safety threats is the identification of dangerous offenders by means of a careful initial classification process."

and

"A driving force has been the recognition that classification is a basic decision-making process that supports most of the correctional policy goals of any jail or prison. This is profoundly illustrated by a l970 Rhode Island court decision (see Gettinger, 1982) that clearly indicates the multiple roles of classification in both jails and
prisons:

> Classification is essential to the operation of an orderly and safe prison. It is a prerequisite for the rational allocation of whatever program opportunities exist within the institution. It enables the institution to gauge the proper custody level of an inmate, to identify the inmate's education, vocational, and psychological needs, and to separate non-violent inmates from the more predatory. Classification is indispensable for any coherent future planning."

and

"Specifically, correctional classification systems have moved away from so-called "subjective" models to "objective" systems. Subjective models tend to reply on informational criteria that often lead to inconsistency and error in staff decision making. Conversely, objective systems depend on a narrow set of well-defined legal factors (e.g., age, marital status, etc.). These items are weighted and assigned differential values within a well-defined instrument that is then used to assess an inmate's level of risk or program needs. Objective systems place greater emphasis on fairness, consistency, and openness in the decision making process."

In the Corrections.com document, "*A look at Subjective and Objective Classification*", it reports:

"It is said that the California Department of Corrections and the Federal Bureau of Prisons were the pioneers in using objective classification systems

before 1980. Since then, virtually all-50 states as well as Puerto Rico and the Virgin Islands have fully implemented objective systems."

NIC's manual on Objective Jail Classification Systems is used in all fifty states and is considered the national standard. This system has also been widely supported by the Courts across the country.

Mr. Sweeney would have one believe that Clayton County's classification system, which was based essentially on whether the detainee's criminal history showed a violent or assaultive felony as opposed to a misdemeanor assault, was acceptable. 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 presented during a face to face interview was available to Clayton County, but they chose not use it.

Facility Design, Security, And Staffing

- Mr. Sweeney states that the window glazing used for Clayton County Jail Cell 610 was adequate because it was designed by the architectural firm of HOK and is a standard size for the industry.

    - Comment: HOK is just an architectural firm that designs jails for government agencies. Generally, window glazing size is a determination made by the agency and their design team. These determinations should be based on line of sight and continuous observation objectives, however at times these decisions are driven by budget constraints, as glazing is extremely costly. When designing sleeping cell doors, it is particularly important to achieve optimal visibility from the pod control center. This remote surveillance ability is of the utmost importance to jail security and staffing levels. When this visual monitoring from the control center is impossible, as it was at the Clayton County Jail, the absence of sight line has to be overcome, for example, by providing continuous observation by roving staff members, a costly solution to say the least.

- Mr. Sweeney indicates that the window glazing was appropriate because it allowed for the privacy provisions found within the PREA standards.

- Comment: This position misrepresents PREA. While privacy concerns are important, they do no supersede safety and security. Many agencies have addressed PREA standards by designing and/or installing privacy panels or shields. PREA standards and other privacy measures are well published and very achievable for correctional administrators. If instituted correctly, inmate privacy issues like strip searches, showering, clothing change out, and toiletrine can be accomplished, and must be, but this has nothing to do with window glazing size. These provisions must be accomplished regardless. Mr. Sweeney's position on privacy issues relating to the window size and electronic monitoring cameras is further refuted when it is known that most of the privacy concern activities take place in open areas of booking, dayrooms, shower areas, lavatory areas and open housing areas where visibility is wide open. In these same areas within the Clayton County Jail, cameras and personnel are always present and privacy issues still must be addressed. When determining the appropriate size of window glazing safety, security and optimal visibility must be the driving motivations for jail administrators. When addressing PREA, these provisions must be addressed regardless of facility design.

  As for electronic monitoring cameras, Mr. Sweeney also addresses privacy concerns here, particularly for their use in sleeping cells. Electronic monitoring (cameras) are commonly used throughout jail facilities and have been for years. The privacy concerns that Mr. Sweeney addressed with window glazing are the same with video surveillance. These cameras are commonly found focusing on inmate areas where there are varying stages of undress, showering, toiletrine and clothing change out are taking place. Privacy concerns have long been addressed regarding the use of cameras in those areas just as they could be in sleeping cells. In fact, more and more frequently, today's jail administrators are or are considering the use of cameras in all lock down cells like sleeping cells, segregation cells, medical cells, holding cells, padded cells and so forth. Here again, security and safety concerns first.

- Mr. Sweeney indicates that medical records are not available to correctional personnel because of HIPPA regulations.

  - Comment: While HIPPA regulations are clear about the confidentiality of medical records everywhere to include jails, there are also provisions

within HIPPA that allow for this information to be shared with correctional administrators when it involves facility safety and secure matters.

- Mr. Sweeney states that the staffing within the Clayton County Jail was adequate.

    - Comment: There are newspaper reports that the Sheriff's Office was sixty positions short, thirty-six of which were correctional officer in nature. In addition, housing unit security personnel were moved around to perform other jail functions during the very time of the Grochowski assault – further proving that there were staff shortages within the Clayton County Jail. Given the closed front door cells and small windows, and a classification system that classified as compatible for housing young detainees with a history of misdemeanor assault with older detainees without any violent history, then staffing per housing unit should be 3-4 guards with a floor rover continuously conducting rounds. I would further emphasize that just because the Georgia Sheriff's Association did a staffing assessment does not mean it was correct. Staffing plans should be done by an independent agency that is not in corroboration with the Sheriff's Office.

- Mr. Sweeney indicates that fights between cell mates represent only 15% of inmate fights/assaults.

    - Comment: If Mr. Sweeney is indicating that 15% is acceptable, I would certainly disagree here. When I indicated that cell fights are common between cell mates, I was not inferring that these fights represented a high number like 15%, only that they were common. Zero percent is the number as to which we should strive. Regular and frequent security rounds, comprehensive and objective Classification systems that consider the most important factor of assaultive versus non-assaultive criminal history, and good line of sight monitoring of inmate housing areas from the control center, whether visual or electronic, are the most successful means to reduce assaults. Unfortunately, Clayton County was deficient in each of these areas.

- Mr. Sweeney states, "Two inmates resided in this cell, and the double celling of inmates who are classified as medium custody, general population, is the accepted normal practice for jails nationally and in the state of Georgia.

Everything else regarding staffing shortages and overcrowding numbers is just subterfuge."

- Comment: "Subterfuge." Clayton County had a non-negotiable responsibility to prevent this, whether through additional staffing, more comprehensive classification, improved division of the jail facility design to accommodate better inmate separation by classification groups, or more frequent security rounds, to address proper security. The failure of Clayton County to fulfill its duty resulted in Mr. Grochowski's death.

EDWARD SWEENEY FEBRUARY 13, 2018 DEPOSITION

- Mr. Sweeney stated that the Clayton Classification System was adequate. He stated it was a Northpointe system. Mr. Sweeney said the classification tree was an adequate form.

  - Comment: The Clayton County Classification Form is antiquated, inadequate and incomplete. For Brooks, it was not even completed well. My comments above in response to the Sweeney Report about classification issues, reflect my position here concerning the Sweeney deposition testimony on this subject.

- Mr. Sweeney states that housing unit correctional officers do not or should not have access to the criminal history of the inmate population.

  - Comment: This statement is not true. 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 inmates' 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 inmate's denial of prior assaultive behavior, which additionally reflects on the ability to trust the inmate in other areas.

- Mr. Sweeney states that correctional officers are capable of doing classification and medical screening if medical staff are not available.

    - Comment: Perhaps with the proper classification training, correctional officers could perform the function of a classification officer, but only with that specialized training. As for doing the medical screening, I would question whether this is even remotely possible. Without the specialized medical education of a nurse or a paramedic, it would be impossible for any correctional officer to complete the medical screening form. Further, without this medical education, these correctional officers would not responsibly understand the information they are being provided. Any agency that allowed the medical screening to be performed by an untrained correctional officer has set themselves up for extreme liability and certain tragedy.

- Mr. Sweeney states that classification information is not available to housing unit correctional officers.

    - Comment: This is not true. Correctional officers can and should be able to access inmate files. With the Northpointe system that Mr. Sweeney indicated was used by Clayton County, correctional staff could access this information throughout the jail.

- Mr. Sweeney said that while double celling may foster fights, single celling will increase suicides.

    - Comment: Theses two important issues, preventing fights and suicides, are independent and must be dealt with by objectively reasonable responses posed to the unique problems posed by each. With adequate medical and mental health service and good classification, suicidal inmates should not go undetected and suicides certainly should not increase because of housing assignments whether single or double cell. A jail cannot avoid its duty to prevent in-cell assaults simply because they have the duty of preventing suicides. A jail that pits one of these duties against the other is exceptionally ill managed. Mr. Sweeney appeared to be confusing single celling or single occupancy cells with isolation or solitary confinement.

- Mr. Sweeney expressed that age is not a crucial factor for correctional classification systems. Further, he stated that only violent/non-violent and sentenced/unsentenced status matters to a good classification system.

    - Comment: Mr. Sweeney is again wrong. Age is an important and noted stability factor in any objective classification system. When utilized properly in the classification process, it can enhance the safety and security of any correctional system. Violent, non-violent, sentenced, unsentenced are of equal import, but they are only a part of a complete objective classification system and should only be included as such. Several authorities referenced above use age as a crucial classification factor. My comments regarding classification issues in the Sweeney Report also support my position herein concerning the Sweeney deposition.

- Mr. Sweeney states that it was only a thirty-second fight. He said that he determined this by walking through the report events, in his office with a stop watch.

    - Comment: Mr. Sweeney cannot make this time estimate with any degree of accuracy. No one really knows how long the threatening or assaultive behavior actually took place. Further, with continuous observation one may have been able to notice unacceptable tension between Brooks and Grochowski as of the first day of the cell-assignment, based in part on my review of the video of Brooks.

- Mr. Sweeney said that the ACA Standards for Adult Correctional Institutions 4th Edition did not apply to the Clayton County Jail; only the ACA Performance - Based Standards for Adult Local Detention Facilities 4th Edition is applicable.

    - Comment: This statement is neither true nor accurate. ACA publishes over twenty different standards manuals and the provisions provided within are interwoven with other standards. Simply because a standard comes from one manual or another, may or may not make it applicable to a specific facility. Typically, a jail would be accredited under Adult Local Detention Facility (ALDF) Standards, and a Prison facility would be accredited under Adult Correctional Institution (ACI) Standards. The standards can be exactly the same, or differ only slightly. In the

beginning, ACA offered only one set of Standards and as time passed and correctional conditions were litigated, these Standards were amended, changed and updated. To clarify – from the initial ACA Standards, the Performance-Based Standards for Adult Detention Facilities evolved, and then the Standards Supplement were added, and during the same time frame, the simplified version of the Standards was developed. These simplified Standards were titled CORE Jail Standards. Regardless of the facility types, these standards all apply and should be utilized. For objectively responsible correctional administration, all of these standards are given full consideration. To provide an example of this cross-over provisional consideration, it can be specified that all of the performance-based standards are included in the ACA Standards for Adult Correctional Institutions. Full consideration of all ACA standards manuals should be given to ensure total operational efficiencies.

- Mr. Sweeney implied that an inmate calling out for assistance was just as effective to secure an officer's attention as utilizing a call button. He added to this statement by saying that if call buttons were inoperable or being ignored, an inmate could always get the officer's attention by just calling out.

    - Comment: The Clayton County Jail is a podular design with three separate glazing panels between the control center officer and the inmate sleeping cells. For a roving officer, this separation could be as few as one panel or as many as five. Only if the rover is within the same pod, would it be even remotely possible for that officer to hear an inmate calling out from a sleeping cell. These glazing panels are designed for security control, but they are also provided for sound dampering. The correctional floor plan for these housing unit pods reveal these panels.

- Mr. Sweeney's report implies that the NIC Jail Design Guide only requires and only addresses observation from the guard tower of cell fronts, as opposed to the interior of the cells.

    - Comment: If I understood Mr. Sweeney's deposition correctly he said that he did not mean to imply that a proper jail design does not need to consider the ability to observe in-cell from the guard tower or elsewhere. If I am incorrect about his deposition testimony, Mr.

Sweeney's report focused on jail security as being only from the guard tower to the front of the cell door and did not address the relevant chapter on "Single Versus Multiple Occupancy" housing, section 4, chapter 27, p. 305-310. National institute of Corrections (NIC) 2011 Jail Design Guide – Third Edition. This chapter and page 309 provides as follows:

On balance, it seems that certain security and management 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 inmates.

Given the increased operational vulnerabilities of multiple-occupancy housing (with the exception of direct supervision facilities), jurisdictions should evaluate whether initial construction cost savings are merely expenses deferred until a later date. Potentially, these savings may at some point be offset by higher medical bills due to more frequent assaults, higher repair costs due to increased damage to jail property, or unanticipated legal costs arising as inmates or their families sue to recover damages as a consequence of injuries received in the jail. Each jurisdiction must weigh the costs of staffing and other issues before committing to multiple-occupancy cells.

The chapter also provides:

"[Multiple-occupancy cells] greatly reduces the staff's ability to prevent physical or sexual assaults, especially during nighttime lockdown or other times when staffing levels tend to be reduced. The exception would be in direct supervision facilities where staff have a continuous presence."

"[Multiple-occupancy cells] increases tensions because inmates have no place to which to retreat to ensure personal safety or personal space and no place in which personal property can be completely protected from theft or vandalism."

"[Multiple-occupancy cells]causes inmates to completely forfeit personal privacy because they may openly share toilet fixtures in close quarters and no other area of the facility affords individual privacy."

In summation, my response is not intended to be argumentative nor discredit Mr. Sweeney, it is only meant to provide my response to his statements.

Respectfully submitted this February 19th, 2018,

Michael A. Berg

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay

any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.