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APPENDIX A

[DO NOT PUBLISH]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-13059

D.C. Docket No. 1:16-cv-23925-CMA

[Filed November 21, 2018]

FIOR PICHARDO DE VELOZ,)
CESAR CRISTOBAL VELOZ TIBURICO,)
Plaintiffs-Appellants,)
)
versus)
)
MIAMI-DADE COUNTY, MIAMI-DADE)
CORRECTIONS AND REHABILITATION)
DEPARTMENT, FATU KAMARA-HARRIS,)
Nurse, THE PUBLIC HEALTH TRUST OF)
MIAMI-DADE COUNTY, FLORIDA, d.b.a.)
Jackson Health System, TRAVARRI)
JOHNSON, Corporal, et al.,)
Defendants-Appellees,)
)
BOBBY MARSHALL, Nurse, et al.,)
Defendants.)

Appeal from the United States District Court
for the Southern District of Florida

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(November 21, 2018)

Before ED CARNES, Chief Judge, and ROSENBAUM and HULL, Circuit Judges.

HULL, Circuit Judge:

Plaintiff Fior Pichardo De Veloz brought this lawsuit against defendants Nurse Fatu Kamara Harris and Dr. Fredesvindo Rodriguez-Garcia who work in the medical unit at the Turner Guilford Knight Correctional Center (the “TGK jail”). In her second amended complaint, Mrs. Pichardo seeks damages for injuries that she sustained during her time in pre-trial custody. After a strip search at booking, Mrs. Pichardo was determined to be a biological female and booked into the TGK jail as a female. Nonetheless, about six hours later, defendants in the medical unit sent Mrs. Pichardo to a male prison without physically examining her, without investigation, and indeed in the face of considerable information that she was a woman. The district court granted the defendants’ motion to dismiss the second amended complaint.

This appeal involves only Mrs. Pichardo’s 42 U.S.C. § 1983 deliberate indifference claims against defendants Nurse Harris and Dr. Rodriguez-Garcia. Mrs. Pichardo alleges her constitutional rights were violated by Nurse Harris’s and Dr. Rodriguez-Garcia’s knowledge of and deliberate indifference to the substantial risk of serious harm she faced by their wrongfully classifying her as a male inmate. After careful review, and with the benefit of oral argument, we reverse the district court’s order as to Mrs. Pichardo’s § 1983 claims against Nurse Harris and Dr. Rodriguez-Garcia and remand for further proceedings.

I. FACTUAL BACKGROUND

Because the defendants moved to dismiss the second amended complaint under Federal Rule of Civil Procedure 12(b)(6), we accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff Mrs. Pichardo. See Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008). Also, because Mrs. Pichardo's second amended complaint incorporates by reference the Miami-Dade County Internal Investigation report into this incident, as well several witness statements, we may properly consider those documents on appeal. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) (“[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment.”).¹

A. Arrest and Booking as a Female

On November 4, 2013, Mrs. Pichardo—who is a wife, mother, grandmother, prominent lawyer, and elected official in her home city in the Dominican Republic—flew to Miami to be with her daughter, who was expecting a child. At that time, Mrs. Pichardo was 50 years old and undergoing hormone replacement

¹ The defendants, who also relied on these documents at length, attached them to their motion to dismiss and do not object to our consideration of them on appeal.

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therapy as prescribed by a doctor to address symptoms of menopause. She also suffered from high blood pressure.

Upon arrival at the Miami International Airport, at approximately 5:30 p.m., Mrs. Pichardo was arrested on an outstanding warrant. The arrest affidavit listed Mrs. Pichardo's gender as female.

Around 6:30 p.m., Mrs. Pichardo was booked into the TKG jail, which is operated by the Miami-Dade County Corrections and Rehabilitation Department. At booking, Mrs. Pichardo's gender was entered as female and she was processed through intake as female. More specifically, at 7:17 p.m., a female officer strip searched Mrs. Pichardo, during which she had to "lift her arms, turn around, bend over at the waist, grab her butt cheeks, spread, [and] cough." The female officer was required to "look at [Mrs. Pichardo's] entire body and make sure there's nothing inserted up the reproductive area, nothing taped to the body, nothing hidden."

Correctional officers conducting this initial strip search are responsible for determining an inmate's gender. If during a strip search, an officer discovers the inmate is of the opposite gender than he or she appears to be, the search is discontinued and a supervisor and officer of the inmate's gender is summoned to continue with the strip search. And if a doubt exists regarding the inmate's gender, medical staff are summoned and present during the strip search as well. According to the female officer who conducted Mrs. Pichardo's strip search, she "did not notice anything abnormal" and gave Mrs. Pichardo the orange uniform that female

inmates wear. Thus, through the strip search, Mrs. Pichardo was correctly classified as a female.

B. Defendants Reclassify Mrs. Pichardo as Male

At approximately 12:00 a.m. on November 5, due to Mrs. Pichardo's history of high blood pressure, Officer Kimberly Jones escorted her to the medical unit for evaluation. Mrs. Pichardo arrived in the medical unit handcuffed along with other female inmates. She was not there for the medical staff to make a gender determination. At that time, Officer Audrey Morman, defendant Nurse Harris, and defendant Dr. Rodriguez-Garcia were working in the medical unit of the TGK jail. Officer Morman placed Mrs. Pichardo and the other female inmates in a cell to wait for the doctor to see them. Dr. Rodriguez-Garcia was the attending physician on duty. Both he and Nurse Harris are licensed medical professionals with many years of experience and were aware that women in their fifties are likely to be undergoing menopause and that women undergoing menopause are commonly given some form of hormone replacement therapy.

While Mrs. Pichardo was waiting, Nurse Harris approached Officer Morman and asked her if Mrs. Pichardo was a male. Although Nurse Harris had not yet seen or interacted with Mrs. Pichardo, she told Officer Morman that she thought that Mrs. Pichardo might be male based on a note in her medical file indicating that she was undergoing hormone replacement therapy. Nurse Harris told Officer Morman that male inmates take hormone pills to enhance their breasts; however, Nurse Harris later

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acknowledged knowing that menopausal women take hormone replacement pills too.

In response, Officer Morman told Nurse Harris that Mrs. Pichardo had been booked and classified as female. But Nurse Harris insisted that Mrs. Pichardo might not be female because she took hormone pills. Officer Morman told Nurse Harris that she still believed Mrs. Pichardo was female because she looked like a woman and her file had “the blue tab,” which said female and was circled in red. Nevertheless, Nurse Harris said she was going to examine Mrs. Pichardo.

Officer Morman and Nurse Harris then walked over to the holding cell and Nurse Harris asked Mrs. Pichardo if she was female. Mrs. Pichardo told Nurse Harris that she was a woman and did not understand why her gender was being questioned. Nurse Harris also asked Mrs. Pichardo if she had “female parts.” Once again, Mrs. Pichardo answered that she did and did not understand why she was being asked those questions.

At approximately 2:00 a.m., Nurse Harris escorted Mrs. Pichardo to the examination room but was not present during Dr. Rodriguez-Garcia’s assessment of Mrs. Pichardo. Dr. Rodriguez-Garcia evaluated Mrs. Pichardo, “which consisted of medical history questions in Spanish, a visual check of the eyes, mouth and skin for sores and [listening] to the lungs with a stethoscope.” Dr. Rodriguez-Garcia did not physically examine Mrs. Pichardo undressed and in fact he did not ask her to remove her clothes.

Dr. Rodriguez-Garcia said that, when he began the examination, he had reviewed Mrs. Pichardo’s medical

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pre-screening documentation, which stated that she was undergoing hormone replacement therapy. Mrs. Pichardo's medical pre-screening assessment form, dated November 4, 2013, at 6:44 p.m. indicated that she took hormone replacement pills, but also said "Menopause Medical" under the comments. Despite being aware that menopausal women commonly take this type of medication, Dr. Rodriguez-Garcia assumed that she was a man undergoing gender reassignment. "[H]e did not know why but when he learned that Inmate Pichardo was on [hormone replacement therapy], he assumed that she was transgender."

Dr. Rodriguez-Garcia "explained that based on the [hormone replacement therapy] and the assumption that she (Pichardo) was transgender; he asked her in a general sense if she had all [of her] 'sex parts,' [by] which he meant genitals." He also "asked Inmate Pichardo if she had any surgery to her genitals." Mrs. Pichardo replied that she did have all of her genitals and had not had any surgery on her genitals.

At no point did Dr. Rodriguez-Garcia ask Mrs. Pichardo if she was a woman, a man, or transgender. While he vaguely asked about her "sex parts," he did not ask her if she had male or female genitalia. He also did not ask her why she was on hormone replacement therapy because "it was a difficult question to ask."

Dr. Rodriguez-Garcia decided to reclassify Mrs. Pichardo as male because she was on hormone replacement therapy. He wrote on her medical chart that she was a "male on hormonal treatment transgender" and indicated that she "could go to the general [male] population." He did so without ever

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physically examining Mrs. Pichardo or asking Nurse Harris to physically examine her.

Dr. Rodriguez-Garcia explained that in cases where a visual check of the genitals is required, the patient is taken to the clinic where a doctor, nurse, and officer are present to perform the check. He acknowledged that he has conducted such visual checks to verify an individual's gender before, but did not perform such a visual check to verify Mrs. Pichardo's gender. Instead, he made a note in her medical record that an assessment of her genital-urinary system was "deferred"—meaning that an assessment would be conducted at a later time. Dr. Rodriguez-Garcia knew that by classifying Mrs. Pichardo as a male, she would be placed in an all-male detention facility.

Five minutes after Nurse Harris took Mrs. Pichardo to the examination room, Nurse Harris came back and told Officer Morman that "everything fell out," by which she meant Mrs. Pichardo's "penis [and] testicles." Nurse Harris, however, was not present during Dr. Rodriguez-Garcia's medical evaluation of Mrs. Pichardo and had no basis for this statement. Nurse Harris also later admitted that Dr. Rodriguez-Garcia did not tell her about his conversation with Mrs. Pichardo.

Once again, Officer Morman told Nurse Harris that she believed Mrs. Pichardo looked like a female, but Nurse Harris insisted that Mrs. Pichardo was a man. Officer Morman reviewed Mrs. Pichardo's booking record and reminded Nurse Harris that Mrs. Pichardo was strip searched when she arrived at the facility. Officer Morman later explained that if Mrs. Pichardo

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had a penis and testicles, the officer who strip searched her during booking would have seen them. That is why Officer Morman did not believe that Mrs. Pichardo was a man because it would have been discovered during initial booking.

Officer Morman called her supervisor, Sergeant Regina Price, to explain the situation. According to Officer Morman, Sergeant Price also did not believe that Mrs. Pichardo was male. However, because Dr. Rodriguez-Garcia had seen Mrs. Pichardo and because Nurse Harris had said she was a man, Sergeant Price sent Officer Jones back to the medical unit to escort Mrs. Pichardo to an all-male cell. Sergeant Price also asked Officer Morman to get an addendum from Nurse Harris confirming that Mrs. Pichardo was male, which the officer did. Nurse Harris gave Officer Morman a health services incident addendum that identified Mrs. Pichardo as: “Transgender, male parts, female tendencies.”

Officer Kimberly Jones then returned to the medical unit to bring Mrs. Pichardo back to her cell. When Officer Jones arrived, she learned that Doctor Rodriguez-Garcia and Nurse Harris had determined that Mrs. Pichardo was a man. Officer Jones then asked Nurse Harris three times if she had strip searched or physically examined Mrs. Pichardo before claiming that she was a man. Nurse Harris did not verbally confirm that she physically examined Mrs. Pichardo or even answer Officer Jones’s questions. Instead, Nurse Harris simply replied “she’s a man” and walked away. Even though Nurse Harris insisted that Mrs. Pichardo was a man, Officer Jones believed that Mrs. Pichardo was a woman.

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At about 2:15 a.m., Officer Jones escorted Mrs. Pichardo from the medical unit and had her sit by herself outside the shift commander's office. Officer Jones did so because she felt that Mrs. Pichardo was female and she wanted to speak to her supervisor, Sergeant Price. Officer Jones was concerned because Mrs. Pichardo appeared to be female and "nothing about her said male."

Based on Dr. Rodriguez-Garcia's assessment, Sergeant Price directed Officer Jones to contact booking and advise them to change Mrs. Pichardo's sex from female to male. Officer Jones followed Sergeant Price's instructions and, at 2:20 a.m., the booking department changed Mrs. Pichardo's sex classification to male. As a result, Mrs. Pichardo was transferred to Metro West, a male correctional facility, where she was treated as a man and placed with the general male population.

C. Transfer to a Male Facility

At about 12:43 p.m. on November 5, Mrs. Pichardo arrived at the Metro West jail. A female officer escorted her to one of the cells in Three Alpha Wing, a transit unit for new arrivals. Mrs. Pichardo told the officer that she was a woman. The officer recognized that Mrs. Pichardo was female and replied: "you are a woman. Good luck if you are alive tomorrow."

When Mrs. Pichardo was placed in Three Alpha Wing, she was terrified. She was surrounded by approximately 40 men and feared for her life. The male inmates harassed her. Mrs. Pichardo was too afraid to use the restroom that was being used by the male inmates and urinated on herself instead. Mrs. Pichardo

later told an investigator she felt “psychologically assaulted because everyone looked at her as if she was a piñata.” The male inmates gathered in small groups, called out to her, “Mami, Mami,” and laughed. At some point, Mrs. Pichardo asked a female officer to please move her because “she was going to go crazy.”

An officer in Three Alpha Wing said that Mrs. Pichardo was assigned to Bunk 2 “because whenever there is someone that looks female, we always put [th]em to the front so that the officer can watch them” for protection. The officer also explained that Mrs. Pichardo looked scared to get off of her bunk and did not want to interact with the other inmates.

While she was in that cell, Mrs. Pichardo met an elderly man and told him that she was a woman. The older man informed corrections officers that Mrs. Pichardo was female but the officers did nothing.

D. Metro West Staff Reclassifies Mrs. Pichardo as Female

Meanwhile, Mrs. Pichardo’s family members were trying to contact her. They had not heard from Mrs. Pichardo after her arrest, so they drove to the TGK jail. An officer there told the family members that Mrs. Pichardo was housed at the Metro West jail, which they later learned was a male detention facility. Mrs. Pichardo’s family informed the TGK jail staff that Mrs. Pichardo was a woman and asked why she was housed in the male detention facility. As a result of their prodding, the staff initiated an investigation to determine Mrs. Pichardo’s gender.

At approximately 7:30 p.m. on November 5, Mrs. Pichardo was strip searched again, this time by a

female nurse at the Metro West jail. Several male corrections officers were present during the strip search and laughed at her. Mrs. Pichardo also remembered that someone took pictures of her while she was undressed. The female nurse who conducted this second strip search said that her initial impression was that Mrs. Pichardo was female and the strip search verified Mrs. Pichardo's biological sex to be female. The nurse also learned that Mrs. Pichardo was a mother of three children and was taking hormone pills for menopausal treatment. According to the nurse, Mrs. Pichardo did not appear to be transgender. Mrs. Pichardo was then separated from the general male population.

E. Transfer Back to the Female Facility and Release

At around 9:00 p.m. on November 5, Mrs. Pichardo was transferred back to the TKG jail and housed in an all-female unit. The next day, the TKG jail released Mrs. Pichardo into the custody of the United States Marshal Service. As a result of the defendants' actions, Mrs. Pichardo alleged that she suffered from medically diagnosed post-traumatic stress disorder, marital instability, ridicule of her family, humiliation, and professional decline.

II. PROCEDURAL HISTORY

In her second amended complaint, Mrs. Pichardo raised 15 claims under both federal and state law against multiple defendants, all of whom moved to

dismiss the claims.² Relevant to this appeal, Mrs. Pichardo alleged two claims against Nurse Harris and Dr. Rodriguez-Garcia under § 1983 and the Fifth and Fourteenth Amendments for deliberate indifference to a substantial risk of serious harm to her health and safety.

The defendants moved to dismiss the complaint for failure to state a claim, arguing that they did not violate Mrs. Pichardo's clearly established constitutional rights and were entitled to qualified immunity. Ultimately, the district court dismissed all of the federal claims against all defendants³ and declined to exercise supplemental jurisdiction over the state law claims. As to the deliberate indifference claims, the district court determined that Mrs. Pichardo did not state a cause of action because Nurse Harris and Dr. Rodriguez-Garcia did not have "the subjective knowledge required to state claims of deliberate indifference." Because Mrs. Pichardo did not show Nurse Harris and Dr. Rodriguez-Garcia violated a constitutional right, the district court concluded that both were entitled to qualified immunity.

Mrs. Pichardo timely appealed.

² Although Mrs. Pichardo's husband, Cesar Cristobal Veloz Tiburcio, brought a state law claim for loss of consortium against the defendants and his name is on the notice of appeal, the briefs on appeal do not address his claim. At oral argument, Mrs. Pichardo's counsel explained that Mr. Veloz does not challenge on appeal the district court's dismissal of his loss of consortium claim.

³ Plaintiff Mrs. Pichardo sued more than ten other defendants, but Nurse Harris and Dr. Rodriguez-Garcia are the only defendants in this appeal.

III. STANDARD OF REVIEW

The district court's Rule 12(b)(6) dismissal is subject to plenary review. Lane v. Philbin, 835 F.3d 1302, 1305 (11th Cir. 2016). To survive a motion to dismiss, the complaint must have set out facts sufficient to "raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007). This means Mrs. Pichardo must have alleged "factual content that allow[ed] the court to draw the reasonable inference that the defendant[s] [were] liable for the misconduct." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). "The allegations must be plausible, but plausibility is not probability." Lane, 835 F.3d at 1305.

IV. DISCUSSION

A. Qualified Immunity

Nurse Harris and Dr. Rodriguez-Garcia maintain that they are entitled to the protections of qualified immunity. To receive qualified immunity, a public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002). Mrs. Pichardo does not dispute that Nurse Harris and Dr. Rodriguez-Garcia were acting "within the scope of [their] discretionary authority," so she bears the burden of showing that the defendants are not entitled to qualified immunity. Perez v. Suszczynski, 809 F.3d 1213, 1218 (11th Cir. 2016).

To meet this burden, Mrs. Pichardo must establish both that: "(1) the defendants violated a constitutional right, and (2) this right was clearly established at the

time of the alleged violation.” Caldwell v. Warden, FCI Talladega, 748 F.3d 1090, 1099 (11th Cir. 2014) (internal quotations omitted). We address these issues in turn below.

B. Violation of a Constitutional Right

We first consider whether, taken in the light most favorable to Mrs. Pichardo, the facts alleged in the second amended complaint show that Nurse Harris’s and Dr. Rodriguez-Garcia’s conduct violated a constitutional right. As a pretrial detainee, Mrs. Pichardo’s rights “exist under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment.” Mann v. Taser Int’l, Inc., 588 F.3d 1291, 1306 (11th Cir. 2009). Nonetheless, “the standards under the Fourteenth Amendment are identical to those under the Eighth.” Goebert v. Lee Cty., 510 F.3d 1312, 1326 (11th Cir. 2007).⁴

The Eighth Amendment “imposes [a] dut[y] on [prison] officials” to “take reasonable measures to guarantee the safety of the inmates.” Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976 (1994) (internal quotations omitted). In particular, under the Eighth Amendment, prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Id. at 833, 114 S. Ct. at 1976. “It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim’s safety.” Id. at 834, 114 S. Ct. at 1977.

⁴ Because all parties refer to Mrs. Pichardo’s claims as Eighth Amendment claims, we do too for purposes of this opinion.

A prison official violates the Eighth Amendment “only when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk.” Bowen v. Warden Baldwin State Prison, 826 F.3d 1312, 1320 (11th Cir. 2016) (internal quotations omitted). To state an Eighth Amendment claim of deliberate indifference, a plaintiff must allege facts sufficient to show (1) that she was subjected to a “substantial risk of serious harm,” (2) the defendants’ deliberate indifference to that risk, and (3) causation. Purcell ex rel. Estate of Morgan v. Toombs Cty., 400 F.3d 1313, 1319 (11th Cir. 2005).

The first element—a substantial risk of serious harm—is assessed under an objective standard. Caldwell, 748 F.3d at 1099. Because Mrs. Pichardo’s alleged risk of serious harm has to do with the jail’s environment, her case falls into the “conditions of confinement” category of deliberate-indifference cases as opposed to the medical treatment category. See generally Rhodes v. Chapman, 452 U.S. 337, 101 S. Ct. 2392 (1981) (conditions of confinement); Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285 (1976) (medical treatment). In this context, Mrs. Pichardo must allege that the confinement condition she complains of was sufficiently serious to violate the Eighth Amendment. See Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004). We have explained that “[w]hile an inmate need not await a tragic event before seeking relief, [s]he must at the very least show that a condition of [her] confinement pose[d] an unreasonable risk of serious damage to h[er] future health or safety.” Id. (internal quotations and citations omitted).

In this particular case, no party disputes that placing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female's future health or safety. Nor should they dispute this. It is abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered. See Purcell, 400 F.3d at 1320 (explaining that a prisoner has a right, secured by the Eighth Amendment, to be “reasonably protected from constant threat of violence and sexual assault” by her fellow inmates). After all, female and male inmates are not housed together in prisons because this risk is not only self-evident, but serious and real.

The parties also do not dispute that Mrs. Pichardo sufficiently alleged the third element, causation. It is the second element of an Eighth Amendment claim—the defendants' deliberate indifference to a substantial risk of serious harm—that forms the crux of the matter at hand. Specifically, both Nurse Harris and Dr. Rodriguez-Garcia primarily argue that they cannot be liable under the Eighth Amendment because Mrs. Pichardo (1) did not allege that they had the required actual, subjective knowledge that she was a woman, and (2) then knowingly disregarded the risk associated with wrongfully reclassifying her as a male. We disagree.

To satisfy the second deliberate indifference element, a plaintiff must sufficiently allege that the defendant actually (subjectively) knew that an inmate faced a substantial risk of serious harm. Caldwell, 748 F.3d at 1099–1100. The Supreme Court in Farmer held

that the prison “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer, 511 U.S. at 837, 114 S. Ct. at 1979. This requirement of subjective culpability means that it is not enough for a plaintiff to merely establish that “a reasonable person would have known, or that the defendant should have known” of a substantial risk of serious harm. Id. at 843 n.8, 114 S. Ct. at 1982 n.8.

It is true that the defendants must have had actual, subjective knowledge that Mrs. Pichardo was a female. However, even under this subjective standard, a prison official cannot hide behind an excuse that he was unaware of a fact or risk if that fact or risk would have been obvious to anyone. Id. at 842–43, 114 S. Ct. at 1981–82. This is because the subjective standard can be proven with circumstantial evidence:

Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that a risk was obvious.

Id. at 842, 114 S. Ct. at 1982 (citations omitted). In addition, a prison official’s subjective knowledge can be proven through circumstantial evidence showing that, for example, the substantial risk was “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been

exposed to information concerning the risk and thus ‘must have known’ about it.” Id. at 842–43, 114 S. Ct. at 1981–82 (internal quotations omitted).

Importantly to this case, while a prison official may show that the obviousness of a risk escaped him, he cannot escape liability “if the evidence show[s] that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist.” Id. at 843 n.8, 114 S. Ct. at 1982 n.8 (emphasis added); see also Goebert, 510 F.3d at 1328 (“Choosing to deliberately disregard, without any investigation or inquiry, everything any inmate says amounts to willful blindness.”).

With these principles in mind and viewing the allegations in a light most favorable to Mrs. Pichardo, we conclude that the extensive facts alleged in the second amended complaint give rise to the inference that, at a minimum, Nurse Harris and Dr. Rodriguez-Garcia “strongly suspected” that Mrs. Pichardo was a female but “refused to verify the underlying facts” that would prove her female gender to be true. They then (1) deliberately reclassified Mrs. Pichardo’s gender as male, in the face of the contrary evidence that she was a woman, and (2) knew that reclassifying her as male would send her to the male jail population where her safety and life would be at risk. This amounts to deliberate indifference under Farmer. 511 U.S. at 843 n.8, 114 S. Ct. at 1982 n.8.

To begin with, Mrs. Pichardo appeared to be a woman. Both Officers Audrey Mormon and Kimberly Jones interacted with Mrs. Pichardo and said that she

appeared to be female. And during initial booking, a female officer, who was responsible for determining Mrs. Pichardo's gender, strip searched Mrs. Pichardo and determined that she was a woman. If Mrs. Pichardo had a penis and testicles, the officer would have discovered them during the strip search. But she did not. Instead, the female officer looked at Mrs. Pichardo's entire body and "did not notice anything abnormal."

That Mrs. Pichardo was a woman was also well-documented and expressly noted by prison officials. First, Mrs. Pichardo's arrest warrant said she was female. As for prison records, Mrs. Pichardo was classified as female at booking and housed with the female inmates. Her file specifically reported that she was female, that she had been strip searched at intake, and that she was taking hormone replacement therapy for menopause. In turn, both Nurse Harris and Dr. Rodriguez-Garcia reviewed Mrs. Pichardo's medical file before seeing her, which listed her sex as female. Both medical personnel also noticed that Mrs. Pichardo was taking hormone replacement pills, which they knew women take to treat menopause symptoms.

As to Nurse Harris specifically, the circumstances show that Nurse Harris was exposed to consistent and repeated information that Mrs. Pichardo was a woman. First, Mrs. Pichardo told the nurse that she was a woman and had all of her "female parts." Officer Audrey Morman repeatedly informed Nurse Harris that Mrs. Pichardo was a woman and reminded her that she had been strip searched at booking and classified as female. Similarly, Officer Kimberly Jones asked Nurse Harris no fewer than three times if she

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had strip searched or physically examined Mrs. Pichardo before claiming that she was a man because the officer was concerned Mrs. Pichardo was a woman.

Nevertheless, in the face of all of this evidence that Mrs. Pichardo was female, Nurse Harris refused to physically examine Mrs. Pichardo or to ask Dr. Rodriguez-Garcia to physically examine her before reclassifying her as a man. Not only did she stubbornly refuse to confirm Mrs. Pichardo's sex, she intentionally lied to Officer Morman about it, indicating to the officer that Mrs. Pichardo had a penis and testicles. In response to this lie, Officer Morman again told Nurse Harris that Mrs. Pichardo looked like a woman.

Further, Nurse Harris refused even to engage with Officer Jones's multiple questions about whether Mrs. Pichardo had been strip searched to see if she was male. Instead, Nurse Harris simply said "she's a man" and walked away. Nurse Harris then filled out a health services incident addendum that identified Mrs. Pichardo as "[t]ransgender, male parts, female tendencies" despite knowing that reclassifying Mrs. Pichardo as male would send her to the male population where her safety and life would be at risk. These allegations state a plausible claim of deliberate indifference.

As to Dr. Rodriguez-Garcia, the factual circumstances also show that he too had clear information that Mrs. Pichardo was a woman. Prior to seeing Mrs. Pichardo, he reviewed her pre-screening medical documentation, which noted that she was "Menopause Medical" and taking hormone replacement pills. Thus, medical records expressly showed that Mrs.

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Pichardo's hormone replacement therapy was related to menopause and not to gender transitioning. Further, Mrs. Pichardo came to the medical unit due to her history of high blood pressure. No one sent her there for a gender evaluation. And of course when she arrived in the medical unit, she was wearing the orange uniform that female inmates wear.

Nevertheless, Dr. Rodriguez-Garcia took it upon himself to reclassify her biological sex without physically examining her. Indeed, Mrs. Pichardo's file clearly reported that she had been strip searched during booking and classified as female. This is why Mrs. Pichardo was booked in the female jail in the first place.

Moreover, like Nurse Harris, Dr. Rodriguez-Garcia knew that sending a woman to an all-male prison would pose a risk of serious harm to her safety, however, he took no steps at all to verify Mrs. Pichardo's sex before reclassifying her as male. First, Dr. Rodriguez-Garcia did not physically examine Mrs. Pichardo undressed or conduct a strip search, which he knew was the proper procedure for determining an inmate's sex. He also did not ask her if she was male, female, or transgender. And he intentionally did not ask her why she was taking hormone replacement pills and explained later that it was "a difficult question to ask."

What he did ask Mrs. Pichardo was "in a general sense if she had all [of her] 'sex parts.'" But the answer to that question did not tell Dr. Rodriguez-Garcia anything about whether Mrs. Pichardo was a man or a woman. These allegations support a reasonable

inference that despite his assumption otherwise, Dr. Rodriguez-Garcia “strongly suspected” that Mrs. Pichardo was in fact female and “refused to verify underlying facts” that would prove her female gender to be true. See Farmer, 511 U.S. at 843 n.8, 114 S. Ct. at 1982 n.8.

Here, Nurse Harris’s and Dr. Rodriguez-Garcia’s choosing to deliberately disregard the wealth of information that Mrs. Pichardo was female—the fact that she was strip searched, booked as female, and appeared to be female—and reclassifying her as male without any investigation or physical exam is sufficient to show that they “refused to verify underlying facts that [they] strongly suspected to be true, or declined to confirm inferences of risk that [they] strongly suspected to exist.” Id. Accordingly, Mrs. Pichardo’s allegations state a plausible § 1983 claim of deliberate indifference against Nurse Harris and Dr. Rodriguez-Garcia sufficient to survive a motion to dismiss. The district court erred in concluding otherwise.

C. Clearly Established Law

Having determined that Mrs. Pichardo plausibly alleged that Nurse Harris’s and Dr. Rodriguez-Garcia’s conduct violated the Eighth Amendment, we turn to “whether the Eighth Amendment right at issue ‘was clearly established such that a reasonable [prison] official would understand what he [or she] is doing violates that right.’” Brooks v. Warden, 800 F.3d 1295, 1306 (11th Cir. 2015) (quoting Coffin v. Brandau, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc)).

To determine whether a right is clearly established, we ask whether it would be clear to a reasonable prison

official that his or her conduct was unlawful in the situation confronted. See Vinyard v. Wilson, 311 F.3d 1340, 1350 (11th Cir. 2002) (recognizing that “fair and clear notice” is the cornerstone of the qualified immunity analysis). There are several ways to assess whether a right is clearly established. See id. at 1350–53. First, the plaintiff can point to a materially similar case decided at the time of the relevant conduct by the Supreme Court, the Eleventh Circuit, or the relevant state supreme court. See J W ex rel. Tammy Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1259–60 (11th Cir. 2018). “Second, the plaintiff can identify a broader, clearly established principle that should govern the novel facts of the situation.” Id. Third, even in the absence of factually similar case law, prison officials can have fair warning that their conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as “obvious clarity” cases. See United States v. Lanier, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997); Vinyard, 311 F.3d at 1350–51.

We conclude that at the time of this incident in 2013, every reasonable prison officer and medical personnel would have known that wrongfully misclassifying a biological female as a male inmate and placing that female in the male population of a detention facility was unlawful. The conduct at issue here lies so obviously at the very core of what the Eighth Amendment prohibits, that the unlawfulness of placing a female detainee within the male population was readily apparent to any prison officer or medical personnel in the shoes of Nurse Harris and Dr.

Rodriguez-Garcia. Accordingly, neither is entitled to qualified immunity.

V. CONCLUSION

For the foregoing reasons, we conclude that Mrs. Pichardo may proceed with her § 1983 deliberate indifference claims against Nurse Harris and Dr. Rodriguez-Garcia. We therefore reverse the district court's order as it relates to the federal claims against Nurse Harris and Dr. Rodriguez-Garcia and remand for further proceedings consistent with this opinion.

REVERSED IN PART AND REMANDED.

APPENDIX B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 16-23925-CIV-ALTONAGA/O’Sullivan

[Filed June 8, 2017]

FIOR PICHARDO DE VELOZ and)
CESAR CRISTOBAL VELOZ TIBURCIO,)
Plaintiffs,)
)
v.)
)
MIAMI-DADE COUNTY, <i>et al.</i> ,)
Defendants.)

ORDER

THIS CAUSE came before the Court on Defendants, Miami-Dade County, the Public Health Trust, Miami-Dade Corrections and Rehabilitation, Daniel Junior, Officer Audrey Morman, Sergeant Regina Price, Officer Kimberly Jones, Officer Tavaraz Carter, Corporal Travarri Johnson, Carlos A. Migoya, Dr. Fredesvindo Rodriguez-Garcia, and Nurse Fatu Kamara Harris’s Motion to Dismiss [ECF No. 75] filed February 23, 2017. Plaintiffs, Fior Pichardo de Veloz and Cesar Cristobal Veloz Tiburcio, filed their Response [ECF No. 83] on March 23, 2017; to which Defendants filed a Reply [ECF No. 91] on April 6, 2017.

The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. BACKGROUND

Plaintiffs bring this suit seeking damages under 42 U.S.C. section 1983 and on various state law theories against Defendants for injuries sustained by Fior Pichardo de Veloz¹ during her time in the custody of the Miami-Dade Corrections and Rehabilitation Department ("MDCR"). (*See generally* Second Amended Complaint [ECF No. 40]). On November 4, 2013, Pichardo traveled from the Dominican Republic to Miami for a family visit. (*See id.* ¶ 3). At the time, Pichardo was 50 years old and undergoing hormone replacement therapy as prescribed by her doctor to address the symptoms of menopause. (*See id.* ¶¶ 3 (citation omitted), 21). Pichardo also suffered from high blood pressure. (*See id.* ¶ 3 (citation omitted)).

When she arrived at Miami International Airport, Pichardo was arrested on an outstanding warrant and booked into the Turner Guilford Knight Correctional Center ("TGK"). (*See id.* (citations omitted); *see also* Resp. 2). Upon her arrival at TGK, a non-defendant officer conducted a strip search of Pichardo at 7:17 p.m., "look[ing] at [the inmate's] entire body and mak[ing] sure there [was] nothing inserted up the reproductive area." (2d. Am. Compl. ¶ 24 (citation omitted; second alteration in original)). Strip searches are directed by corrections officers although medical

¹ According to a Miami-Dade Security and Internal Affairs Bureau Memorandum (Mot., Ex. 1, SIAB Memorandum [ECF No. 75-1] 1), Plaintiff's correct name is "Flordaliza Pichardo."

staff is often present. (*See id.* ¶ 32 (citation omitted)). According to the officer who conducted the search, she “did not notice anything abnormal.” (*Id.* ¶ 24).

Due to Pichardo’s history of high blood pressure, Defendant Officer Kimberly Jones escorted her to the medical unit for evaluation later that night. (*See id.* ¶ 25). Upon arrival at the medical unit, at approximately midnight on November 5 (*see* SIAB Mem. ¶ 36), Pichardo was placed in a cell with other female inmates (*see* 2d Am. Compl. ¶ 25). Defendant Officer Audrey Morman was working in the medical unit. (*See id.*). Prior to seeing or interacting with Pichardo, Defendant Nurse Harris approached Officer Morman’s desk to question her about Pichardo’s sex, apparently based on a note in Pichardo’s file regarding hormone replacement therapy. (*See id.*; *see also* Mot., Ex. 3, Statement of Officer Morman² [ECF No. 75-3] 6:14–7:5). Nurse Harris indicated she believed Pichardo might be male because she was undergoing hormone replacement therapy. (*See* Morman Statement 7:2–20). Officer Morman pointed out Pichardo’s file listed Pichardo as female and explained she believed

² As the Motion and Response note, the Second Amended Complaint incorporates by reference the SIAB Memorandum and several witness statements. (*See* Mot. 4; Resp. 8–9). These documents are properly considered on a motion to dismiss. *See, e.g., Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368–69 (11th Cir. 1997) (“[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff’s claim, then the [c]ourt may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant’s attaching such documents to the motion . . . will not require conversion of the motion into a motion for summary judgment.” (alterations added; citation omitted)).

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Pichardo to be female, but Nurse Harris stated she would nevertheless “check her out.” (*Id.* 7:25–8:8).

Officer Morman accompanied Nurse Harris to retrieve Pichardo from the cell for her examination. (*See id.* 8:23–9:2). Nurse Harris then asked Pichardo if she was female and had “female parts,” and a visibly offended Pichardo replied she was. (*Id.* 9:9–16; *see also* 2d Am. Compl. ¶ 26).

Nurse Harris escorted Pichardo into the examination room; Officer Morman did not accompany them. (*See* 2d Am. Compl. ¶ 27). While in the examination room, Pichardo did not remove her clothes. (*See id.*) According to the Second Amended Complaint and SIAB Memorandum, neither Nurse Harris nor the physician on duty, Dr. Fredesvindo Rodriguez-Garcia, physically examined Pichardo. (*See* SIAB Mem. ¶¶ 39, 43; *see also* 2d Am. Compl. ¶¶ 31 (citation omitted), 50 (citation omitted)). Only Dr. Rodriguez-Garcia was present while Pichardo was in the examination room. (*See* 2d Am. Compl. ¶ 32 (citation omitted); *see also* SIAB Mem. ¶ 43).

Following the examination, Nurse Harris told Officer Morman, “everything fell out,” by which she meant “penis, testicles.” (2d Am. Compl. ¶ 27 (citation, internal quotation marks omitted); Morman Statement 11:2–8). Officer Morman explained she believed Pichardo appeared to be female, but Nurse Harris insisted Pichardo was a male. (*See* 2d Am. Compl. ¶ 27; Morman Statement 11:2–8).

Officer Morman reviewed Pichardo’s file, confirmed she was strip-searched during booking, and observed the file did not note any issues regarding Pichardo’s

classification as a female during the strip search. (*See* 2d Am. Compl. ¶ 28 (citations omitted)). Officer Morman then called her supervisor, Defendant Sergeant Regina Price, to explain the situation. (*See id.* ¶ 29). Sgt. Price also apparently questioned whether Pichardo was male but nevertheless gave instructions to have Pichardo taken to an all-male cell. (*See id.* (citation omitted)).

Upon her return to the examination unit, Officer Jones — the escorting officer — was informed of the change in the determination of Pichardo's sex. (*See id.* ¶ 30 (citation omitted)). Officer Jones asked Nurse Harris two to three times whether she had strip-searched or physically checked Pichardo to determine whether Pichardo was a male. (*See id.* (citation omitted); Mot., Ex. 2, Statement of Officer Jones [ECF No. 75-2] 7:15–8:14). Nurse Harris did not verbally confirm she physically examined Mrs. Pichardo, but finally replied, “she’s a man.” (Jones Statement 8:2–3, 8:9–17).

Officer Jones, apparently still doubtful of the correctness of Nurse Harris's statements, contacted her supervisor, Sgt. Price, for guidance. (*See id.* 15:17–16:3). Sgt. Price directed Officer Jones to contact Booking and advise the department of the change in Pichardo's sex determination. (*See id.* 16:5–9). Officer Jones followed Sgt. Price's orders and notified Booking of the change. (*See* 2d Am. Compl. ¶ 35). A Booking officer changed Pichardo's file without first reviewing any supporting documentation. (*See id.*).

Following the change to her file, Pichardo was transferred to Metro West, an all-male facility. (*See id.*

¶ 36). She arrived at Metro West at approximately 12:43 p.m. on November 5. (*See* SIAB Mem. ¶ 36). She was placed with the general population in Three Alpha Wing. (*See* 2d Am. Compl. ¶ 37). A female officer, referred to as Officer Jane Doe No. 1, placed Pichardo in the cell. (*See id.* ¶ 38). Officer Doe No. 1 apparently acknowledged Pichardo was female, but said only “you are a woman. Good luck if you are alive tomorrow.” (*Id.* (internal quotation marks omitted)).

After her placement in Three Alpha Wing, Pichardo was surrounded by approximately 40 men and harassed by the male inmates. (*See id.* ¶ 39). Pichardo later told the investigator she felt “psychologically assaulted because everyone looked at her as if she was a *piñata*.” (*Id.* (citation, internal quotation marks omitted)). Pichardo was too afraid to use the all-male bathroom and instead urinated on herself. (*See id.* (citation omitted)). At some point, she asked an unknown female officer to move her out of Three Alpha Wing “because she was going to go crazy.” (*Id.* (citation omitted)).

Defendant Officer Tavarez Carter, who was in charge of conducting head counts in Three Alpha Wing, noted Pichardo looked scared to get off her bunk and did not want to interact with other inmates. (*See id.* ¶ 41 (citation omitted)). According to Officer Carter, Pichardo was assigned to Bunk 2, which is closest to the supervising officers. (*See* Resp. 6). Officer Carter told the investigator Pichardo was specifically assigned to Bunk 2 “because whenever there is someone that looks like a female, we always put [th]em to the front so that the officer can watch them.” (*Id.* (alteration added; citation omitted)).

On November 5, 2013, Pichardo's family members, in their attempts to contact Pichardo, questioned corrections officers at TKG as to why Pichardo was housed at an all-male facility. (*See* SIAB Mem. ¶ 6). As a result of their prodding, a corporal at TKG contacted the Shift Commander who initiated an investigation into Pichardo's sex. (*See id.*). Pichardo was strip-searched a second time, this time by non-party Nurse De La Esprieciella in the North Clinic at Metro West. (*See* 2d Am. Compl. ¶ 42). This second strip search took place between 6:50 p.m. and 8:23 p.m. on November 5. (*See* SIAB Mem. ¶ 36). Pichardo claims there were several male corrections officers present, laughing at her during the search. (*See* 2d Am. Compl. ¶ 42). Pichardo also recalls photographs were taken of her while she was undressed. (*See id.*). Following this strip search, which confirmed Pichardo's biological sex to be female, Pichardo was separated from the general male population. (*See id.*).

Pichardo was subsequently returned to TKG and housed in an all-female unit. (*See* SIAB Mem. ¶ 6). On November 6, 2013, Pichardo was released from MDCR to the custody of the United States Marshal Service. (*See* 2d Am. Compl. ¶ 47).

Pichardo and her husband, Cesar Cristobal Veloz Tiburcio, filed their initial Complaint [ECF No. 1] on September 13, 2016. Plaintiffs have since twice amended the complaint,³ and the Second Amended Complaint is the current operative pleading.

³ The deadline for amending pleadings was March 10, 2017. (*See* Order Setting Trial . . . [ECF No. 58]). As stated, Defendants filed the present Motion on February 23, 2017.

The Second Amended Complaint contains 15 claims for relief under both state and federal law, against multiple Defendants. The federal law claims, all brought under 42 U.S.C. section 1983, include: (1) four counts of failure to intervene (Count I – Sgt. Price, Count II – Officer Jane Doe No. 1, Count III – Officer Carter, and Count IV – Corporal Johnson); (2) three counts of deliberate indifference (Count V – Nurse Harris, Count VI – Dr. Rodriguez-Garcia, and Count VII – Officer Jane Doe No. 1); and (3) one count of violation of privacy rights and unreasonable searches against Miami-Dade County (Count VIII). To avoid repetition, the Order addresses the particulars of each of these claims in the Analysis section, section III, below.

The state law claims include: one count of negligence against the corrections officers and Miami-Dade County (Count IX); one count of negligence against the Public Health Trust (Count X); one count of negligent infliction of emotional distress against the corrections officers and Miami-Dade County (Count XI); one count of negligent infliction of emotional distress against Nurse Harris, Dr. Rodriguez-Garcia, and the Public Health Trust (Count XII); one count of negligent hiring and retention against the Public Health Trust (Count XIII); one count of violating Section 901.211, Florida Statutes, against Miami-Dade County (Count XIV); and one count of loss of consortium brought by Pichardo's husband against all Defendants (Count XV). Because the Court concludes dismissal of the federal claims is appropriate, and it will not retain jurisdiction over the remaining state law

claims, this Order does not address the latter claims' sufficiency.

II. LEGAL STANDARD

“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (alteration added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Id.* (alteration added) (quoting *Twombly*, 550 U.S. at 555). Pleadings must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted). Indeed, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556). To meet this plausibility standard, a plaintiff must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678 (alteration added) (citing *Twombly*, 550 U.S. at 556).

Courts apply this standard by (1) eliminating allegations which amount to “mere[] legal conclusions,” *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (citation omitted); and (2) assuming the veracity of well-pleaded factual allegations and determining whether those “plausibly give rise to an

entitlement to relief,” *id.* (internal quotation marks and citation omitted; alteration added).

Apart from the factual allegations of the Second Amended Complaint, which are construed in the light most favorable to the plaintiff, *see Brooks*, 116 F.3d at 1369 (citation omitted), the Court also properly considers the SIAB Memorandum and witness statements at the motion to dismiss stage (*see* note 2, *supra*). And where the exhibits “contradict the general and conclusory allegations of the pleading, the exhibits govern.” *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009) (quoting *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007) (holding, because the police reports attached to the complaint contradicted plaintiff’s allegations about what the officers saw, the court would “not credit [plaintiff’s] allegation” (alteration added))). This is because when a plaintiff relies on an attachment to support its allegations, courts may similarly depend on it to establish the facts. *See id.* at 1292 (*citing Thompson v. Ill. Dep’t of Prof’l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002) (“The fact remains that where a plaintiff attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim.”)).

III. ANALYSIS

The Defendant corrections officers move to dismiss the federal law claims against them on the grounds they did not violate Pichardo’s clearly established constitutional rights and so are entitled to qualified immunity. (*See* Mot. 5–12). Defendants further argue the section 1983 claim against Miami-Dade County

should be dismissed because Plaintiffs have failed to properly satisfy the *Monell*⁴ standard, as is required to bring a section 1983 claim against a local government entity. (*See id.* 12–16). Nurse Harris and Dr. Rodriguez-Garcia contend because the Second Amended Complaint fails to state a claim of deliberate indifference, and there is no resulting constitutional violation, the medical staff Defendants are also entitled to qualified immunity. (*See id.* 16–19).

While not necessary to resolve the sufficiency of the pleading’s federal claims, the Court notes two additional arguments raised by Defendants. Defendants argue Defendants Carlos Migoya and Daniel Junior should be dismissed because the Second Amended Complaint does not contain a single allegation involving them, and Counts II and VII must be dismissed as to the multiple Doe Defendants under Rule 4(m). (*See id.* 2 nn.1–2). The Court addresses these arguments in turn.

A. Claims Subject to the Qualified Immunity Defense

Defendants assert Sgt. Price, Officer Carter, Cpl. Johnson, Nurse Harris, and Dr. Rodriguez-Garcia are all entitled to qualified immunity. (*See id.* 8–12, 18–19).

“A complaint is subject to dismissal under Rule 12(b)(6) when its allegations, on their face, show that an affirmative defense bars recovery on the claim.” *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) (citing *Marsh v. Butler Cty.*, 268 F.3d 1014, 1022 (11th

⁴ *Monell v. Dep’t of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978).

Cir. 2001) (en banc). Once a qualified immunity defense has been asserted, unless Plaintiffs’ “allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Absent such allegations, it is appropriate for a district court to grant the defense of qualified immunity at the motion to dismiss stage.” *Id.* (alterations, ellipses, internal quotation marks, and citations omitted); see also *Bloom v. Alverez*, 498 F. App’x 867, 872 (11th Cir. 2012) (“[A] defense of qualified immunity may be addressed in a motion to dismiss, which will be granted if the complaint fails to allege the violation of a clearly established constitutional right.” (internal quotation marks and citation omitted; alteration added)).

Qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.” *Iqbal*, 556 U.S. at 672 (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It “balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). “Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Kingsland v. City of Miami*, 382 F.3d 1220, 1231 (11th

Cir. 2004) (internal quotation marks and citation omitted).

To be entitled to the qualified immunity defense, a government official must demonstrate “he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.” *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (internal quotation marks and citation omitted). The parties agree the individual Defendants were acting within the scope of their discretionary authority (*see* Mot. 9 n.3 (citation omitted); *see also* 2d Am. Compl. ¶¶ 19, 65, 80, 138, 152); therefore, the burden “shifts to the plaintiff[s] to show that qualified immunity is not appropriate.”⁵ *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted; alteration added).

“To survive a motion to dismiss based upon qualified immunity, the plaintiff must have alleged sufficient facts to support a finding of a constitutional violation of a clearly established law.” *Chandler v. Sec’y*

⁵ This two-step approach is enshrined in the Eleventh Circuit’s *Zeigler/Rich* analysis which provides:

1. The defendant public official must first prove that “he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.”
2. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant’s part. This burden is met by proof demonstrating that the defendant public official’s actions “violated clearly established constitutional law.”

Courson, 939 F.2d at 1487 (quoting *Rich v. Dollar*, 841 F.2d 1558, 1563–64 (11th Cir. 1988) (discussing two-part test)); *see also Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983) (per curiam).

of *Fla. Dep't of Transp.*, 695 F.3d 1194, 1198–99 (11th Cir. 2012) (citation omitted). The plaintiffs “bear the burden of showing that the federal rights allegedly violated were clearly established.” *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996). This requires Plaintiffs’ factual allegations, accepted as true, show both (1) Defendants violated a constitutional right and (2) the constitutional right at issue was “clearly established” at the time of the violation.⁶ See *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

To satisfy the “clearly established” requirement, a law may not be “defined ‘at a high level of generality,’” and the “clearly established law must be ‘particularized’ to the facts of the case.” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted). Although the Supreme Court “do[es] not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2007) (citations omitted; alterations added).

A defendant is entitled to qualified immunity “unless the law preexisting the defendant official’s supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in the defendant’s place would be on notice . . . what the defendant official was doing would be clearly unlawful given the circumstances.” *Pace v.*

⁶ Judges need not address these prongs in any particular order. See *Pearson*, 555 U.S. at 236 (Judges “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”).

Capobianco, 283 F.3d 1275, 1282 (11th Cir. 2002) (alteration added). “This exacting standard ‘gives government officials breathing room to make reasonable but mistaken judgments’ by ‘protect[ing]’ all but the plainly incompetent or those who knowingly violate the law.” *Young v. Borders*, 850 F.3d 1274, 1282 (11th Cir. 2017) (alteration in original) (quoting *City and Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015)). Furthermore, in this Circuit, only decisions of the United States Supreme Court, Eleventh Circuit, and highest relevant state court can clearly establish the law for qualified immunity purposes. See *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007) (citing *Marsh*, 268 F.3d at 1032 n.10).

1. Failure to Intervene Claims (Counts I, III, and IV)

Plaintiffs assert Sgt. Price, Cpl. Johnson, and Officer Carter, all of whom either knew or suspected Pichardo was female, failed to intervene to prevent Pichardo from being placed in an all-male cell. This failure to protect her from unsafe conditions of confinement, according to Plaintiffs, violated Pichardo’s constitutional rights. (See Resp. 9 (“[E]ach of the correction [sic] officers named failed to intervene in the placement of the Plaintiff in grave danger and were each in a unique position to do so” (alterations added))).

With respect to Sgt. Price, the failure to intervene claim in Count I alleges she was “acting under color of state law . . . when she instructed her subordinates that Mrs. Pichardo, although evidently a woman, should be classified as a male.” (2d Am. Compl. ¶ 65

(alteration added)). Plaintiffs state Sgt. Price had “a duty to provide safe conditions of confinement” and “to stop other defendant corrections officers from placing Mrs. Pichardo in unnecessarily dangerous conditions of confinement.” (*Id.* ¶ 66). Defendant breached that duty by failing to “provide safe conditions . . . and . . . prevent other defendant corrections officers from placing Mrs. Pichardo” in such conditions. (*Id.* ¶ 67 (alterations added)). Plaintiffs further allege Sgt. Price’s “direct[ing] Mrs. Pichardo to be confined with male inmates” after “Officer Morman told Sergeant Price that Mrs. Pichardo was female and had already been strip searched by Booking” demonstrates a “reckless disregard for the known rights of Mrs. Pichardo.” (*Id.* ¶¶ 68–69 (alteration added)).

As to Officer Carter, Count III alleges he breached his duty “to stop other defendant corrections officers from placing Mrs. Pichardo in unnecessarily dangerous conditions of confinement . . . when he failed to prevent her from being placed in” such conditions, after Pichardo and other inmates told Officer Carter Pichardo was female. (*Id.* ¶¶ 80–82 (alteration added)).

Finally, Count IV alleges Cpl. Johnson violated Pichardo’s constitutional rights by failing to intervene “[d]espite suspecting [Pichardo] might be a woman” and “after talking to [Pichardo] and noticing her feminine features.” (*Id.* ¶ 87 (alterations added)). Plaintiffs allege Cpl. Johnson “owed Mrs. Pichardo a duty to stop other defendant corrections officers from subjecting Mrs. Pichardo to unnecessarily dangerous conditions of confinement,” but “breached that duty when he directed Mrs. Pichardo to get to the front of

the line and subjected her to unnecessarily dangerous conditions of confinement.” (*Id.* ¶¶ 88–89).

Sgt. Price, Officer Carter, and Cpl. Johnson argue they are entitled to qualified immunity. Each contends he or she: (1) was “neither in the position nor authorized to question, second guess, or reverse the determination made by the medical staff,” and (2) “the law at the time of the incident was not clearly established so as to put the officers on notice that their conduct was unconstitutional.” (Mot. 5). To this, Plaintiffs insist “[t]here is a well-recognized duty by each of the individually employed constitutional agents . . . named in the Complaint to have protected . . . Mrs. Pichardo, a . . . clearly identifiable female, who had been originally booked as a woman, from being reclassified as a man and placed in the general male population.” (Resp. 10 (alterations added)).

Plaintiffs, however, fail to cite any case law establishing even an analogous duty, much less anything to satisfy their very heavy burden of demonstrating the purportedly “well-recognized” duty is “beyond debate,” as is required by governing law. *al-Kidd*, 563 U.S. at 741 (citations omitted). Plaintiffs do not provide any decisional law finding an officer liable for failing to prevent a female inmate’s placement in an all-male housing unit after medical personnel concluded the inmate was male. Certainly application of broader constitutional principles would not have put the corrections officers on notice they were violating Pichardo’s rights. *See White*, 137 S. Ct. at 552 (“[G]eneral statements of the law are not inherently incapable of giving fair and clear warning’ to officers . . . but, ‘in the light of pre-existing law the

unlawfulness must be apparent.” (alterations added; citations omitted)).

This is particularly the case given Eleventh Circuit precedent, which instructs that a prison official generally “cannot be held liable for a constitutional tort when his administrative decision was grounded in a decision made by medical personnel.” *Acosta v. Watts*, 281 F. App’x 906, 908 (11th Cir. 2008) (citation omitted); *see also Williams v. Limestone Cty.*, 198 F. App’x 893, 897 (11th Cir. 2006) (“[S]upervisory officials are entitled to rely on medical judgments made by medical professionals responsible for prisoner care.” (alteration added; citations omitted)). While it appears in some instances a Miami-Dade corrections officer may make an inmate’s sex determination in the first instance (*see, e.g.*, SIAB Mem. ¶ 34), it is also common practice for medical staff to make that determination alongside the corrections officer, or to be called in to make the determination “when in doubt” (*id.* ¶ 29; *see also* Morman Statement 12:5–13:1, 17:25–18:17). The Court cannot conclude Defendants violated any clearly established constitutional right to intervention in failing to change Pichardo’s sex classification after they perceived medical personnel had conclusively stated Pichardo was male — nor have Plaintiffs pointed to any decision of the Supreme Court, Eleventh Circuit, or highest state court that a failure to do so constitutes a violation of clearly established law.

An independent reason also supports the foregoing conclusion. According to the Second Amended Complaint, Pichardo’s placement in Metro West resulted in verbal harassment from other inmates, not physical injury. (*See* 2d Am. Compl. ¶ 39). The Court

“is doubtful that the Eleventh Circuit recognizes ‘failure to intervene’ claims outside of the context of the . . . excessive force prohibition.” *Whitehurst v. Harris*, No. 6:14-cv-01602-LSC, 2015 WL 71780, at *7 (N.D. Ala. Jan. 6, 2015) (alteration added) (citing *Jones v. Cannon*, 174 F.3d 1271, 1285–86 (11th Cir. 1999)); *see also Tarantino v. Citrus Cty. Gov’t*, No. 5:12-cv-434-Oc-32PRL, 2014 WL 4385550, at *9–10 (M.D. Fla. Sept. 2, 2014) (citing cases illustrating same); *see also Sampson v. City of Brunswick*, CV 211-013, 2013 WL 12134188, at *8 (S.D. Ga. Mar. 1, 2013) (noting same).

Admittedly, the Eleventh Circuit does not appear to have expressly foreclosed the possibility of liability in a non-excessive-force failure to intervene case. *See, e.g., Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986) (“If a police officer, whether supervisory or not, fails to or refuses to intervene when a constitutional violation *such as* an unprovoked beating takes place in his presence, the officer is directly liable under Section 1983.” (emphasis added; citations omitted), *abrogated on other grounds as recognized by Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000)). Yet it is precisely the lack of authority holding an officer liable for failure to intervene in the absence of excessive force that demonstrates Plaintiffs’ claimed constitutional violation is not “clearly established.” Other courts have reached a similar conclusion. *See, e.g., Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999) (no claim for failure to intervene to prevent a false arrest); *Rance v. Bradshaw*, Case No. 15-cv-81210-KAM, 2016 WL 3199002, at *9 (S.D. Fla. June 9, 2016) (no liability for failure to intervene to stop an illegal search); *Green v. Harris*, No. 6:12-cv-00264-VEH-PWG, 2012 WL

4341812, at *1 (N.D. Ala. Aug. 31, 2012) (no liability for failure to intervene to prevent inmates from yelling racial slurs at another inmate).

As discussed, Plaintiffs' burden to demonstrate the Defendant-officers' duties were "clearly established" is exceedingly high. They have failed to do so. This is simply "not a case where it is obvious that there was a violation of clearly established law under" under existing failure-to-intervene precedent. *White*, 137 S. Ct. at 552 (alteration added). Rather, "this case presents a unique set of facts and circumstances" which "alone should [be] an important indication . . . [Defendants'] conduct did not violate a 'clearly established' right." *Id.* (internal citation omitted; alterations added). Therefore, Sgt. Price, Officer Carter, and Cpl. Johnson are entitled to qualified immunity, barring the claims made in Counts I, III, and IV.

2. Deliberate Indifference (Counts V and VI)

Count V alleges Nurse Harris: (1) "[d]espite knowing the risks . . . wrongly re-classified [Pichardo] as male based on no physical or record proof" (2d Am. Compl. ¶ 97 (alterations added)); (2) "acted with deliberate indifference to the safety of Mrs. Pichardo" (*id.* ¶ 99); and (3) "knew or should have known the consequences of wrongfully re-classifying a female as male. A reasonable nurse in a jail would also comprehend that by [doing so], Mrs. Pichardo would be exposed to sexual harassment, rape, and even murder." (*id.* ¶ 100 (alteration added)).

Count VI alleges Dr. Rodriguez-Garcia: (1) "knew that if Mrs. Pichardo were classified as male, she would

be placed in an all-male facility and her safety and life would be at risk” (*id.* ¶ 107); (2) “[d]espite knowing the risks . . . failed to physically examine Mrs. Pichardo and allowed her to be wrongfully re-classified” (*id.* ¶ 108 (alterations added)); (3) “by failing to properly examine and assess Mrs. Pichardo, acted with deliberate indifference to the risks” (*id.* ¶ 110 (alteration added)); and (4) “knew or should have known the consequences of wrongfully classifying a woman as a man in jail. A reasonable doctor in a jail would also comprehend” the dangers (*id.* ¶ 111).

Defendants argue Plaintiffs have not shown Nurse Harris and Dr. Rodriguez-Garcia had the requisite “subjective intent to punish” Pichardo and, therefore, they do not make out deliberate indifference claims under the Eighth Amendment.⁷ (Mot. 17–18 (quoting *Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011))). According to Plaintiffs, “[t]his standard of purposeful or knowing conduct is not . . . necessary to satisfy the mens rea requirement of deliberate indifference for claims challenging conditions of confinement.” (Resp. 14 (alterations added; internal quotation marks omitted) (quoting *Farmer v. Brennan*,

⁷ Claims related to conditions of confinement are generally governed by the Eighth Amendment. Although Pichardo was a pretrial detainee at the time of the described events, and therefore protected under the Fourteenth Amendment’s Due Process Clause as opposed to the Eighth Amendment’s Cruel and Unusual Punishment Clause, the authority is identical. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (“[T]he applicable standard is the same, so decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees.” (alteration added; citations omitted)).

511 U.S. 825, 836 (1994))). The Court examines the parties' competing positions.

“To state an Eighth Amendment claim . . . a prisoner must allege facts to satisfy both an objective and subjective inquiry regarding a prison official's conduct.” *Richardson v. Johnson*, 598 F.3d 734, 737 (11th Cir. 2010) (alteration added) (citing *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004)). To satisfy the objective component, Plaintiffs “must allege a prison condition that is so extreme that it poses an unreasonable risk of serious damage to the prisoner's health or safety.” *Id.* The subjective component requires Plaintiffs to “allege that the prison official, at a minimum, acted with a state of mind that constituted deliberate indifference.” *Id.* To successfully state a claim of deliberate indifference, Plaintiffs “must allege that a prison official (1) had subjective knowledge of a substantial risk of serious harm and (2) disregarded that risk “by conduct that is more than mere negligence.” *Alvarez v. Sec'y, Fla. Dep't of Corr.*, 646 F. App'x 858, 862 (11th Cir. 2016) (internal quotation marks omitted) (quoting *Richardson*, 598 F.3d at 737). The parties disagree about whether the Second Amended Complaint alleges the medical professionals acted with a sufficiently culpable state of mind.⁸

⁸ In the Motion, Defendants use case law in the denial of medical care context. (*See generally* Mot.). While Nurse Harris and Dr. Rodriguez-Garcia are medical professionals, Plaintiffs do not allege a failure to address an objectively serious medical need. Instead, they rely on case law discussing deliberate indifference in the context of conditions of confinement. (*See, e.g.*, Resp. 14 (citing *Farmer*, 511 U.S. at 836)).

Plaintiffs appear to be pleading the civil law standard for recklessness in contrast to the criminal law standard, which requires a knowing disregard of risk. *See Farmer*, 511 U.S. at 836–37 (“The civil law generally calls a person reckless who acts or . . . fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. . . . The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.” (alterations added; internal citations omitted)). The Supreme Court in *Farmer*, a case Plaintiffs themselves rely on, expressly rejected the civil law approach:

We reject petitioner’s invitation to adopt an objective test for deliberate indifference. We hold instead a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, *and he must also draw the inference*. . . . The Eighth Amendment does not outlaw cruel and unusual “conditions”; it outlaws cruel and unusual “punishments.”

Id. at 837 (alteration and emphasis added). Ultimately, “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.” *Id.* at 838.

The facts alleged in the Second Amended Complaint do not satisfy the *Farmer* standard. To the contrary, they specifically foreclose a finding of deliberate indifference because the allegations are that the medical professionals believed Pichardo was male. For example, Plaintiffs state “Nurse Harris concluded that Mrs. Pichardo was male” (2d Am. Compl. ¶ 95); “Nurse Harris concluded that Mrs. Pichardo was a man undergoing gender reassignment” (*id.* ¶ 93); and Dr. Rodriguez-Garcia “concluded that Mrs. Pichardo was a man undergoing gender reassignment” (*id.* ¶ 105). Nothing in the pleading suggests Nurse Harris and Dr. Rodriguez-Garcia realized the inmate, whom they reclassified as a male, was a biological female with a female reproductive system. Stated differently, nothing suggests Defendants “drew the inference” as required by *Farmer*. Accordingly, Plaintiffs do not state claims of deliberate indifference.

This result is consistent with case law in this Circuit. For example, the plaintiff in *Williams v. Department of Corrections* was an incarcerated person who complained multiple times to corrections officers of threats of serious violence by other inmates. *See* No. 15-14141, 2017 WL 432793, at *1 (11th Cir. Feb. 1, 2017) (*per curiam*). The plaintiff was placed in protective management and transferred to another facility, but he was eventually transported back to the institution housing the inmates who had threatened him. *See id.* The plaintiff tried to explain to the corrections officers there was likely a mistake in his housing classification because he had previously been transferred. *See id.* The defendant-officers placed one

of the aggressors in the plaintiff's dormitory, where he eventually attacked plaintiff in his sleep. *See id.*

The Eleventh Circuit held the plaintiff failed to demonstrate the defendants had acted with deliberate indifference, even though plaintiff alleged defendants “failed to check his Department of Corrections[] file before having him returned to [the facility,] . . . failed to provide a safe classification system at [the] prison[,] [a]nd . . . failed to ensure that the Department of Corrections classification board was in compliance with safety procedures.” *Id.* at *4 (alterations added). The court concluded “[a]ccepting those allegations a[s] true, they may demonstrate [the defendants] acted negligently, but they do not show that [they] acted with a ‘sufficiently culpable state of mind’ because [the plaintiff] never alleged that they knew of yet disregarded a risk of serious harm to him.” *Id.* (alterations added) (citing *Chandler*, 379 F.3d at 1289).

“In other words,” the defendants “may have placed [the plaintiff] in danger by failing to take certain actions related to his transfer, but they did not know that they were potentially placing him in serious danger.” *Id.* (alteration added; emphasis in original). The court affirmed dismissal of the claims, explaining “[b]ecause [the plaintiff] failed to allege facts showing . . . defendants . . . knew of and disregarded a risk of serious harm . . . by conduct that is more than negligence, [the plaintiff's] claims against them fail to state a claim.” *Id.* (alterations added; citation omitted).

In this case, as in *Williams*, Plaintiffs fail to allege the subjective knowledge required to state claims of deliberate indifference. Plaintiffs do not plausibly

allege Nurse Harris and Dr. Rodriguez-Garcia actually knew they were placing Pichardo in danger. Accordingly, as Plaintiffs do not show Defendants violated a constitutional right, Dr. Rodriguez-Garcia and Nurse Harris are entitled to qualified immunity.

B. Violation of Privacy Rights & Unreasonable Searches (Count VIII)

In Count VIII, Plaintiffs allege Miami-Dade County “violated Mrs. Pichardo’s right to privacy by: (a) [c]onducting an unjustified and unnecessary examination of her genitals; (b) [p]hotographing her genitals; and (c) [f]orcing her to be nude before male corrections officers.” (2d Am. Compl. ¶ 130 (alterations added)).

Defendants argue this section 1983 claim against the County fails as a matter of law because Plaintiffs are improperly attempting to hold the County liable on a theory of vicarious liability, rather than because of a County policy or custom, as required under federal law. (*See* Mot. 12). In response, Plaintiffs copy a 2005 newspaper article into their Response, describing a settlement the County reached with a number of people subjected to improper strip searches. (*See* Resp. 15–17 (citation omitted)). Plaintiffs claim this article proves “the County has a long, well publicized, and well litigated, custom and policy of unlawful strip searches.” (*Id.* 17). Plaintiffs’ position fails to persuade.

“[A] municipality cannot be held liable under [section] 1983 on a *respondeat superior* theory.” *Monell*, 436 U.S. at 691. Consequently, “[l]ocal governing bodies . . . can be sued directly under [section] 1983 for monetary, declaratory, or injunctive relief where . . .

the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690 (alterations added; footnote call number omitted). In addition, "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' . . . though such a custom⁹ has not received formal approval." *Id.* at 690–91 (alterations and footnote call number added).

To state a *Monell* claim, a plaintiff must allege facts showing: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *Marantes*, 649 F. App'x at 672 (quoting *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)). The alleged custom or policy "must be the 'moving force' behind the constitutional deprivation for there to be sufficient causation." *Id.* (quoting *Monell*, 436 U.S. at 690–94). And a plaintiff:

(1) must show that the local governmental entity . . . has authority and responsibility over the governmental function in issue and (2) must

⁹ A custom is "a practice that is so settled and permanent that it takes on the force of law." *Marantes v. Miami-Dade Cty.*, 649 F. App'x 665, 672 (11th Cir. 2016) (internal quotation marks omitted) (quoting *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997)). This requires a showing of a "longstanding and widespread practice;" a single incident of a violation is insufficient to demonstrate the existence of a policy or custom. *Id.* (internal quotation marks omitted) (quoting *Craig v. Floyd Cty.*, 643 F.3d 1306, 1310 (11th Cir. 2011)).

identify those officials who speak with final policymaking authority for that local governmental entity concerning the act alleged to have caused the particular constitutional violation in issue.

Grech v. Clayton Cty., 335 F.3d 1326, 1330 (11th Cir. 2003) (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (alterations added; additional citations omitted)). Even where a plaintiff intends to prove the existence of an “unofficial custom or practice of the county,” it must be “shown through the repeated acts of a final policymaker for the county.” *Id.* at 1329 (citing *Monell*, 436 U.S. at 690–91) (additional citation omitted).

The Second Amended Complaint does not contain any allegations to support the existence of an unconstitutional County policy or custom related to illegal strip searches. (*See generally* 2d Am. Compl.). Count VIII does not allege Pichardo’s experience was the product of a widespread practice of illegal strip searches. It does not identify any policymakers with authority over the entity. The count refers to “Miami-Dade County’s acts and omissions” (*id.* ¶ 133), but not the individuals with final policymaking authority for the County — namely, the Board of County Commissioners or the Mayor, *see Williams v. Miami-Dade Cty.*, 859 F. Supp. 2d 1297, 1301 (S.D. Fla. 2012), *aff’d in part, rev’d in part on other grounds* 516 F. App’x 899 (11th Cir. 2013); (*see also* Mot. 15 n.4).

Without the plausible factual allegation that final policymakers’ actions caused Pichardo’s injuries, Plaintiffs cannot bring a claim against the County. *See*

Hill v. Clifton, 74 F.3d 1150, 1152 (11th Cir. 1996) (“Only those officials who have final policymaking authority may render the municipality liable under [section] 1983.” (alteration added; citation omitted)). The unsupported declaration “Miami-Dade County” is responsible for Pichardo’s injuries is insufficient to satisfy a claim under *Monell*.

Rather than addressing Defendants’ arguments, Plaintiffs cite a 2005 *Sun Sentinel* article discussing a settlement the County reached with approximately 100,000 individuals improperly strip-searched during the preceding seven years. Plaintiffs argue in their Response the article demonstrates the County has a well-known policy of engaging in illegal strip searches. (See Resp. 15–17 (quoting Chrystian Tejedor, *County to Pay \$4.5 Million to 100,000 People*, SUN SENTINEL (Apr. 19, 2005), http://articles.sun-sentinel.com/2005-04-19/news/0504190132_1_invasive-searches-strip-search-body-cavity-searches)). The Court does not consider the newspaper article, excerpted in a response memorandum, in considering the sufficiency of a claim on a Rule 12(b)(6) motion. See *McKally v. Perez*, 87 F. Supp. 3d 1310, 1317 (S.D. Fla. 2015) (“[A] complaint may not be amended by briefs in opposition to a motion to dismiss.” (alteration added; citations omitted)).

The Court also observes other allegations of the Second Amended Complaint — incorporated by reference into Count VIII (see 2d Am. Compl. ¶ 128) — contradict Plaintiffs’ assertion of the existence of a policy. For example, the pleading contains several

examples of MDCR “policies.”¹⁰ (*See id.* ¶¶ 52–57). The Complaint states the MDCR has “a ‘Zero Tolerance Policy’ for incidents of sexual misconduct against inmates by inmates or staff.” (*Id.* ¶ 52). This includes prohibitions on “taking images of all or part of an inmate’s naked body” (*id.* ¶ 54 (bold removed) (quoting MIAMI-DADE CORR. AND REHAB. DEP’T, INMATE SEXUAL ASSAULT/ABUSE PREVENTION, DEPARTMENTAL STANDARD OPERATING PROCEDURE 15-008 (2012) (“DSOP”) Section II.E.)), and required training of all MDCR staff with access to inmates regarding the “[s]taff’s responsibilities to prevent, detect, report, and respond to sexual violence . . . [and] frisk/strip search procedures for cross gender” (*id.* ¶ 55 (alterations added; bold removed) (quoting DSOP 15-008 Section III.A.1.b & h)). Plaintiffs even allege “Defendants failed to follow their own policies when an inmate, like Mrs. Pichardo, is in their custody and sexually harassed by other inmates.” (*Id.* ¶ 62).

Regardless of whether the referenced operating procedures meet the definition of “policy” as set forth in *Monell* and its progeny, they signify an official rejection of precisely the kind of illegal strip searches Pichardo was allegedly subjected to. These specific statements demonstrate Plaintiffs have not satisfied the *Iqbal* pleading standard that would “permit the court to draw the reasonable inference that [Miami-Dade County] is liable for the misconduct alleged.” 556 U.S. at 678.

¹⁰ Neither Plaintiffs nor Defendants discuss who in the County government is responsible for promulgating these particular “Departmental Standard Operating Procedures.”

As Plaintiffs fail to allege the existence of an official policy or widespread practice of illegal strip searches, Count VIII is dismissed.

C. Carlos A. Migoya and Daniel Junior

Plaintiffs name as Defendants Daniel Junior, individually and as interim director of the MDCR, and Carlos A. Migoya, individually and in his capacity as chief executive officer of the Public Health Trust. As Defendants point out, not a single allegation involves Junior or Migoya individually (*see* Mot. 2 n.2), and a suit cannot be brought against them in their official capacities, *see Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. . . . It is not a suit against the official personally.” (alterations added; emphasis removed; internal citation omitted)).

Because the real parties in interest are the governmental entities and not the named officials, the Court agrees suit against these Defendants in their official capacities is inappropriate, and Junior and Migoya should therefore be dismissed. *See Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991) (“To keep both the City and the officers sued in their official capacity as defendants in this case would have been redundant and possibly confusing to the jury.”).

Defendants have correctly stated the law with respect to official capacity suits, and Plaintiffs do not contest Defendants’ argument. As such, Daniel Junior and Carlos A. Migoya are dismissed.

D. The Doe Defendants

Defendants argue the Doe Defendants should be dismissed because Plaintiffs have yet to identify or serve them. Plaintiffs do not address this argument in their Response.

According to the Federal Rule of Civil Procedure 4(m), “[i]f a defendant is not served within 90 days after the complaint is filed, the court . . . must dismiss the action without prejudice against that defendant or order that service be made.” *Id.* (alterations added). The Rule provides an exception, which allows the court to extend the time for service “if the plaintiff shows good cause.” *Id.* “Good cause exists only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service.” *Bey ex rel. Washington v. Hillsborough Cty.*, No. 16-10608, 2017 WL 474334, at *2 (11th Cir. Feb. 6, 2017) (alteration in original; citation and internal quotation marks omitted).

Plaintiffs do not address Defendants’ argument under Rule 4(m) for dismissing the Doe Defendants, much less show good cause for the failure to timely serve them. Consequently, the Court dismisses those Defendants.

E. Dismissal without leave to amend

“Ordinarily, if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, leave to amend should be freely given.” *Thompson v. City of Miami Beach*, 990 F. Supp. 2d 1335, 1343 (S.D. Fla. 2014) (quoting *Dysart v. BankTrust*, 516 F. App’x 861, 865 (11th Cir. 2013)). District courts may nevertheless “properly deny leave

to amend the complaint . . . when such amendment would be futile.” *Id.* (alteration added) (citation omitted). Dismissal without leave to amend is also appropriate where an amendment to a complaint is sought to be filed well after a scheduling order deadline. *See McKeever v. Liberty Mut. Group Inc.*, 487 F. App’x 487 (11th Cir. 2012).

Plaintiffs have been aware, following a December 20, 2016 Status Conference [ECF No. 31], the Second Amended Complaint would be their final opportunity to plead their federal claims. At the Status Conference, Defendants placed Plaintiffs on notice regarding at least some of the First Amended Complaint’s deficiencies; the Second Amended Complaint does not cure them. Furthermore, the circumstances of this case clearly do not entitle Pichardo to relief under section 1983. Accordingly, the undersigned concludes any further attempts to plead the federal claims would be futile.

With respect to the Doe Defendants, although usually dismissal under Rule 4(m) is without prejudice (*see* FED. R. CIV. P. 4(m)), Plaintiffs have not attempted to argue a “reasonable basis for noncompliance within the time specified,” *In re Trasyol Prods. Liab. Litig.*, No. 08-MD-01928, 2011 WL 830287, at *8 (S.D. Fla. Mar. 8, 2011) (internal quotation marks omitted) (quoting *Gartin v. Par Pharm. Cos., Inc.*, 289 F. App’x 688, 692 (5th Cir. 2008)). Additionally, the Court’s most recent Order granting an extension of time to perfect service explicitly stated the “deadline will not be extended.” (Order [ECF No. 36]). As such, the claims against the Doe Defendants are dismissed with prejudice.

F. The State Law Claims (Counts IX–XV)

District courts may, in their discretion, decide whether to exercise supplemental jurisdiction over state law claims, *see Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088–89 (11th Cir. 2004) (citing *Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999)), and courts in this Circuit are encouraged to dismiss remaining state claims when all federal claims have been dismissed prior to trial, *see id.* at 1089 (citing *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir. 1984)). After “tak[ing] into account concerns of comity, judicial economy, convenience, fairness, and the like,” *Crosby v. Paulk*, 187 F.3d 1339, 1352 (11th Cir. 1999) (alteration added; internal quotation marks and citation omitted), the undersigned concludes exercise of supplemental jurisdiction over the remaining state claims is not appropriate. The better course is dismissal without prejudice to allow Plaintiffs to refile their claims in state court, as they have been unable to properly frame their federal law claims. *See Lagogiannis v. U.S. Bank*, Case No. 14-61809-CIV, 2014 WL 11776950, at *2 (S.D. Fla. Sept. 16, 2014) (citation omitted).

IV. CONCLUSION

In light of the foregoing, it is **ORDERED AND ADJUDGED** that the Motion [**ECF No. 75**] is **GRANTED in part**. The Second Amended Complaint [**ECF No. 40**] is **DISMISSED**. The Clerk is instructed to mark this case as **CLOSED**.

DONE AND ORDERED in Chambers at Key West, Florida, this 8th day of June, 2017.

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/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 17-13059-EE

[Filed January 16, 2019]

FIOR PICHARDO DE VELOZ,)
CESAR CRISTOBAL VELOZ TIBURICO,)
Plaintiffs - Appellants,)
)
versus)
)
MIAMI-DADE COUNTY, MIAMI-DADE)
CORRECTIONS AND REHABILITATION)
DEPARTMENT, FATU KAMARA-HARRIS,)
Nurse, THE PUBLIC HEALTH TRUST OF)
MIAMI-DADE COUNTY, FLORIDA, d.b.a.)
Jackson Health System, TRAVARRI)
JOHNSON, Corporal, et al.,)
Defendants - Appellees,)
)
BOBBY MARSHALL, Nurse, et al.,)
Defendants.)
)

On Appeal from the U. S. District Court for the
Southern District of Florida

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PETITION(S) FOR REHEARING EN BANC

BEFORE: ED CARNES, Chief Judge, and
ROSENBAUM and HULL, Circuit Judges.

PER CURIAM:

The Petitions for Rehearing En Banc are DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35). The Petitions for Rehearing En Banc are also treated as a Petition for Rehearing before the panel and are DENIED. (FRAP 35, IOP 2)

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

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APPENDIX D

**Memorandum
MIAMI-DADE COUNTY**

Date: April 1, 2014

To: Bridgette Cone, /s/ Sgt B Cone
Acting Captain Security and Internal Affairs
Bureau

Via: Dion Butler, Lieutenant
Security and Internal Affairs Bureau

From: Victoria Aguilera, Sergeant /s/ Aguilera
Security and Internal Affairs Bureau

Subject: Memo To File

Case Number: IA-13-435

Complainant Statement:

(Investigator's Note: On November 14, 2013, the Security and Internal Affairs Bureau (SIAB) received information regarding Inmate Fior Pichardo, Jail #130068789. According to the Incident Report #F13011099A, Inmate Pichardo was classified as a male inmate even though Inmate Pichardo was initially booked as a female. See Official Record #2- New Case Update)

On November 21, 2013, at approximately 11:17 a.m., Inmate Fior Pichardo, Jail #130068789, also known as

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Maritza Zeballoz, provided me, SIAB Sergeant Victoria Aguilera, Badge #3479, a sworn recorded statement in the Spanish language at the Federal Detention Center located at 33 N.E. 4th Street, Miami, Florida 33101. Also present during the interview, were SIAB Sergeant Ronald Hartman, Badge #4309, and Federal Detention Officer Cheryl Palmer.

Inmate Pichardo stated that her correct name is "Flordaliza Pichardo" and she is a Citizen of the Dominican Republic. Inmate Pichardo has practiced law in the Dominican Republic for approximately nineteen (19) years. She named "Cesar Veloz" as her spouse, who also resides in the Dominican Republic. Inmate Pichardo explained that she has birthed three (3) children. Inmate Pichardo stated that she traveled to the United States because her daughter, Amanda Paredes, was expecting a child. She provided her daughter's contact number telephone

Inmate Pichardo stated that she has entered the United States on numerous occasions and never encountered any problems. She (Pichardo) explained that Maritza Zeballoz is an alias that she had erroneously used twenty-five (25) years ago. Inmate Pichardo explained that she was arrested at the airport and transported to a jail where she was processed and asked identifying questions such as her name. She (Pichardo) was strip searched by a female officer when she was booked and later asked by several nurses to define her gender as male or female. Inmate Pichardo explained that she had been taken to a clinic-like area at the first jail to have her blood pressure checked because she suffers from hypertension and it was elevated. However, she denied being asked to remove

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her cloths by medical staff to verify her gender at that time. Inmate Pichardo acknowledged that at a later time unknown female nurses asked her to remove her clothing to visually verify her gender and photographs were also taken.

(Investigator's Note: A review of all documentation revealed the photographs taken of Inmate Pichardo, were taken at Metro West Detention Center (MWDC) by Corporal Yvonne Challenger, Badge #4452, in association with Incident Report #M13-006078A.)

According to Inmate Pichardo, the only surgical procedures she has submitted to consist of a Cesarean Section and an Abdominoplasty Procedure. She denied ever submitting to any sex reassignment surgery.

(Investigator's Note: According to WebMD.com, a Cesarean Section is "surgery to deliver a baby through a surgical cut (incision) made in the mother's belly area.")

(Investigator's Note: According to WebMD.com, an Abdominoplasty is a procedure that flattens your abdomen by removing extra fat and considered a "tummy tuck," which doctors call "abdominoplasty.")

Inmate Pichardo was later transported in a van along with several male inmates to MWDC. Upon arriving to MWDC, she (Pichardo) was escorted by correctional officers to Unit #MW3A1, where she remained housed with male inmates.

Inmate Pichardo denied being physically or sexually assaulted by anyone while at MWDC; however, she expressed that she felt psychologically assaulted because everyone looked at her as if she was a "piñata."

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She also stated that she urinated on herself because she was afraid to use the bathroom that was being used by male inmates. The male inmates gathered in small groups, called out to her, “Mami, Mami” and laughed. Inmate Pichardo recalled that she told an unknown female officer who entered the Unit to please move because she was going to go crazy.

(Investigator’s Note: According to Merriam-webster.com, a “piñata” is defined as “a decorated container filled with candies, fruits, and gifts that is hung up at parties or celebrations and hit with a stick by children until it is broken and the things inside it fall out.”)

Inmate Pichardo stated she has never encountered a problem with her gender being questioned and that because she was housed in a male’s facility and her gender questioned, the world now doubts her gender. She could not believe anyone could make such a mistake. (See Official Record #7g- Complainant Statement Form and #17- Sworn Recorded Statement)

Additional Information:

1. The Criminal Justice Information System (CJIS) displays that on November 4, 2013, at approximately 5:30 p.m., Inmate Pichardo was arrested by Miami-Dade Police Department (MDPD) Officer David Jacobs, Badge #1666, at the Miami International Airport (MIA) in Concourse D for Federal Warrant (FW) #0530022192. Additionally, Inmate Pichardo’s is a Dominican Republic citizenship; therefore, a Hold for Immigration was placed.

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Inmate Pichardo was booked into TGK at approximately 7:24 p.m. and issued jail number 130068789. (See Official Record #7a- Inmate Detail Information and #7b- Booking Display)

2. According to the Complaint/Arrest Affidavit in Case #PD131104407599, Inmate Pichardo's gender is female. (See Official Record #7d- Complaint/Arrest Affidavit)
3. According to Inmate Pichardo's Jail Booking Record reflects Inmate Pichardo's gender at the time of booking was entered as female; however, it also reflects that at 2:20 a.m., it was manually changed to male. The hand written change reflects Corporal Yolanda Hannah, Badge #4802, name.

The Jail Booking Record also reflects a hand written notation above Inmate Pichardo's name that reads, "Pending Practitioner." (See Official Record #7e- Jail Booking Record)

4. According to Incident Report #F13-011073A, generated on November 5, 2013, at 5:41 a.m. by Officer Tambrinesha Randall, Badge #6553, to transfer Inmate Pichardo to MWDC. According to Officer Randall's statement, Nurse Harris evaluated and determined that she (Pichardo) had "male sexual reproductive organs." Subsequently, Inmate Pichardo was classified as a male and provided a housing location at MWDC Unit #MW3A1. (See Official Record #4a- Incident Report #F13-011073A)
 - a. The Strip Search Authorization Log, dated November 4, 2013, reflects Inmate Pichardo

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was strip searched at 7:17 p.m. by female Officer Courtney Carpenter, Badge #5981. (See Official Record #4b- Strip Search Authorization Log)

- b. The Health Services Incident Addendum, dated November 5, 2013, reflects Inmate Pichardo was seen at 2:00 a.m. by Nurse Harris. Section "MDCR Comments" reflects, "Trans Gender male parts. Female tendencies." (See Official Record #4c- Health Services Incident Addendum)
 - c. The Mental Health/Medical Relocation Form, dated November 5, 2013, at 5:45 a.m., reflects Inmate Pichardo was cleared to go to general population by Nurse Bobby Marshall. (See Official Record #4d- Mental Health/Medical Relocation Form)
5. A review of the Queue Management System displayed Inmate Pichardo was processed through the Property Room on November 4, 2013, at 8:58 p.m. and seen at the Practitioner Screening station in Unit #K4-6, on November 5, 2013, at 2:14 a.m. This translated into an approximate five (5) hour time frame during which Inmate Pichardo was not being processed. (See Official Record #4e- Queue Management System Printout)
 6. According to the Inmate Profile System (IPS), Major Incident Report #F13-0011099A, generated on November 5, 2013, at 6:45 p.m. by Corporal Dwayne Pinder, Badge #5480, Inmate Pichardo's relatives questioned correctional staff

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assigned to Release at TKG why she (Pichardo) was housed at MWDC, a known male facility. Upon checking Inmate Pichardo's Jail Booking Record and the Criminal Justice Information System (CJIS) for any reports involving Inmate Pichardo, Corporal Pinder contacted IRB Shift Commander Sergeant Antonio Shaw, Badge #5270, who initiated an investigation to determine Inmate Pichardo's gender. Corrections Health Services (CHS) medical staff at MWDC evaluated Inmate Pichardo and determined her gender to be female. During the evaluation, Inmate Pichardo denied being physically harmed in anyway. Inmate Pichardo was transported back to TKG and housed in female Unit #K2-2 on administrative confinement. (See Official Record #3b- Incident Report #F13-0011099A)

According to Incident Report #F13-0011099C, Movement Officer Kimberly Jones, Badge #5996, while assisting in Unit K4-6, Nurse Fatu Harris advised her that Inmate Pichardo's gender was not female. Officer Jones reports that she asked Nurse Harris several times if she was sure and if she had conducted a visual check. Reportedly, Nurse Harris replied, "She's a man" and walked away. Officer Jones then escorted Inmate Pichardo back to the Rear Lobby to complete the booking process. Officer Jones delivered her (Pichardo) Jail Booking Record to Booking Supervisor Corporal Yolanda Hannah, Badge #4802, to have the gender changed from female

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to male. (See Official Record #3b- Incident Report #F13-0011099C)

According to Incident Report #F13-0011099D, generated by Booking Supervisor Corporal Hannah at 2:20 a.m., Officer Jones informed her to change Inmate Pichardo's gender from female to male. (See Official Record #3b- Incident Report #F13-0011099D)

7. According to Incident Report #M13-006078A, generated by Corporal Travarri Johnson, Badge #5898, on November 5, 2013, at 7:30 p.m., Inmate Pichardo was reclassified from MWDC to TGK Unit #K2-2, pending medical clearance by a doctor. (See Official Record #5a- Incident Report #M13-006078A)

On November 5, 2013, at 7:30 p.m., Inmate Pichardo provided an Inmate/Witness Statement regarding Incident Report #M13-006078A, in which she wrote that she did not know why she was housed with men or why she was asked many questions regarding a sex change. She wrote that she felt offended; that she does not have male features and is very feminine; and denied being touched or punched. Inmate Pichardo also wrote that she has been made to undress many times and they keep insisting with the same line of questions regarding her gender, why she had surgery, which she has not had. (See Official Record #5b- Inmate/Witness Statement)

The Health Services Incident Addendum, dated November 5, 2013, at 7:30 p.m., reflects Inmate

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Pichardo was, “seen, visually checked and the sex verified by Nurse De La Esprieciella in the North Clinic.” (See Official Record #5c- Health Services Incident Addendum)

The Physical Sight Check Sheet, dated November 5, 2013, reflects that at 7:30 p.m., Inmate Pichardo was secured in the North Clinic Cell #2 until she was transported at 9:00 p.m. to TKG by Sergeant Terrance Hamilton, Badge #5158, and Corporal Yvonne Challenger, Badge #4452. (See Official Record #5e- Physical Sight Check Sheet)

Corporal Yvonne Challenger, Badge #4452, took five (5) photographs of Inmate Pichardo while at the MWDC North Clinic. The photographs depict her (Pichardo) in an orange inmate uniform. (See Official Record #5g- Photographs)

8. According to the Internal Movement Log for Unit #MW3A1, dated November 5, 2013, Inmate Pichardo arrived at 12:57 p.m. and at 7:00 p.m. she was signed out to the Clinic. (See Official Record #5d- Internal Movement Log)
9. On November 5, 2013, Attorney David Alejandro De Varona unsuccessfully attempted to interview his client, Inmate Pichardo at MWDC. (See Official Record #5i- Attorney/Investigator Form)
10. According to Incident Report #K13-007000A, generated on November 6, 2013, at 6:45 a.m. by Officer Rodney Washington, Badge #4581, Inmate Pichardo was seen by Doctor Pierre Nicolas, who determined Inmate Pichardo was

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not a “transgender” inmate and should be classified to general population as a female. (See Official Record #6- Incident Report #K13-007000A)

11. On November 6, 2013, at approximately 11:50 a.m. Inmate Pichardo was released from MDCR custody to the United States Marshals. (See Official Record #7f- Jail Release Inquiry)
12. On November 19, 2013, Inmate Pichardo, was located in federal custody under the alias of “Maritza Zeballoz” and Registrant #26792-053. A formal letter on Miami-Dade Corrections and Rehabilitation Department (MDCR) letterhead was required to interview her at the Federal Detention Center (FDC); therefore, the letter requesting to interview her (Pichardo) was addressed to Officer Cheryl Palmer of FDC requesting to interview her (Zeballoz).

On November 20, 2013, approval was received. FDC Officer Palmer scheduled the interview for November 21, 2013. (See Official Record #8b- Correspondence)
13. Internet research confirmed that Inmate Pichardo appears to be a prominent political leader and attorney in the Dominican Republic as she stated during her interview. (See Official Record #15- News Media Articles)
14. On November 22, 2013, I contacted Mrs. Amanda Paredes at [REDACTION] who Inmate Pichardo identified as one (1) of her three (3) children, who resides in Miami. Mrs. Paredes acknowledged that Inmate Pichardo is her

biological mother and explained that she had gone to TKG and MWDC in an attempt to see her mother and clarify that her mother is a female. (See Case History)

15. On November 22, 2013, a Core Property inquiry did not yield a photograph of Inmate Pichardo's property; therefore, her passport was not available for review. Additionally, the inquiry reflected that Inmate Pichardo's property had been mailed out to her daughter earlier that day. (See Case History)
16. On November 22, 2013. Attorney David Cabilian contacted me, Sergeant Aguilera, from telephone number [REDACTION], to advise that he was representing Inmate Pichardo and her family in civil litigation against MDCR and Jackson Memorial Hospital (JMH) for "wrongly labeling" Inmate Pichardo as a male and housing her in a male facility. Attorney Cabilian request to be present during any future interviews with Inmate Pichardo or any of her relatives. (See Case History)
17. On November 26, 2013, at approximately 12:14 p.m., Mrs. Amanda Veloz, also known as Amanda Paredes, provided a sworn recorded statement to Sergeant Aguilera at her residence located at [REDACTION.] Also present were her brother-in-law Mr. Ramon Antonio Paredes, Sergeant Signe Anthony, Badge #3690, of SIAB and Attorney Cabilian representing Mrs. Paredes and her family. The interview was conducted in the Spanish language because Mrs.

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Paredes did not speak English. The recorded interview was translated in summary format for this case by Sergeant Aguilera.

Mrs. Paredes identified Inmate Pichardo's booking photograph as her biological mother. Mrs. Paredes explained that she has two (2) siblings who are also Inmate Pichardo's children.

Mrs. Paredes learned that her mother had been arrested at the Miami International Airport (MIA) on United States Marshall (USM) and Immigration holds upon her brother-in-law, Mr. Ramon Paredes, return from MIA. Mrs. Paredes explained that during November 4, 2013, they did not receive any telephone calls from her mother after being arrested; therefore, to no avail they attempted to locate Inmate Pichardo by calling the jails.

On November 5, 2013, at approximately 2:00 p.m. Mr. and Mrs. Paredes along with her (Paredes) brother-in-law, Mr. Ramon Fana, drove to TKG where an unknown Hispanic female officer informed them that she (Pichardo) was being held until she went before a judge. They sat in the lobby to wait. Mrs. Paredes eventually approached an unknown female named "Gloria," who identified herself as a bonds person, to have her solicit information regarding her (Pichardo) bond.

After shift change, Mrs. Paredes again approached the TKG Front Lobby Booth at which time a female officer advised her that

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Inmate Pichardo had been transferred to MWDC and provided her with a handwritten piece of paper with Inmate Pichardo's jail and cell numbers. Unbeknownst to them at the time that MWDC did not house female inmates, Mrs. Paredes and her family drove to MWDC. They arrived at MWDC at approximately 6:30 p.m. According to Mrs. Paredes a slim male officer initially told them that she (Pichardo) was not at MWDC because they do not house female inmates. The officer checked the computer and advised them that although it appeared that Inmate Pichardo was being housed at MWDC it must have been an error because MWDC housed only males. Mrs. Paredes and her family returned to TGGK attempting to locate her mother but the female officer at the Front Lobby Booth insisted that Inmate Pichardo was at MWDC. Mrs. Paredes stated that the female officer consulted a supervisor, later identified as "Sergeant Shaw," who told them that Inmate Pichardo had a vagina and a penis and thus was housed at MWDC. Mrs. Paredes began to cry because she did not know her mother's whereabouts and the officers insisted that her mother had male genitals. According to Mrs. Paredes, her husband told the officers that Inmate Pichardo was a female and that his pregnant wife was her daughter. Eventually, "Gloria" the bonds person advised them to call an attorney. In following the advice, they contacted Attorney Alejandro de Varona, who located her mother (Pichardo) and clarified that Inmate Pichardo was a female. Mrs. Paredes

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explained that Attorney Varona arrived at MWDC at approximately 8:30 p.m. but her mother had already been transferred back to TKG. Although Mrs. Paredes and Attorney Varona were unable to see Inmate Pichardo while in MDCR custody, they learned that she (Pichardo) had been transferred to USM custody two (2) days later.

Mrs. Paredes verified that her mother had two (2) children via natural birth and one (1) child, her brother, via cesarean section. Mrs. Paredes stated that her mother was born a female and her gender had never been questioned.

In closing, Mrs. Paredes wanted the record to reflect that the misclassification of her mother's gender has resulted in great morale damage to her mother, her career, and their family. Mrs. Paredes expressed that the situation has even been exploited by the media and in social networks her mother has been referred to as a hermaphrodite. (See Official Record #11a-Civilian Witness Statement and #17- Sworn Recorded Statement)

18. On November 26, 2013, at approximately 12:14 p.m., Mr. Ramon Fana, who identified himself as Mrs. Paredes' brother-in-law, provided an unsworn recorded statement to Sergeant Aguilera at 1415 N.W. 15th Avenue, Apartment #510, Miami, Florida, 33125. Mr. Fana's statement was provided in Spanish and translated for the purpose of this summary by this investigator, Sergeant Aguilera. Also

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present were Mrs. Paredes, Sergeant Anthony of SIAB and Attorney Cabilian.

Mr. Fana wished the record to reflect that "Sergeant Shaw" was the person who informed Mrs. Paredes that Inmate Pichardo had both a vagina and a penis.

Mr. Fana also alleged that the entire situation had induced Mrs. Paredes' early labor. (See Official Record #11b- Civilian Witness Statement and #17- Recorded Statement)

19. On December 12, 2013, at approximately 3:10 p.m., Sergeant Antonio Shaw, Badge #5270, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB.

Sergeant Shaw is a fourteen (14) year veteran, who has been assigned to IRB for approximately eleven (11) months.

Sergeant Shaw recognized Inmate Pichardo's booking photograph as an inmate he had seen in the Rear Lobby at TKG. Upon reviewing her (Pichardo) Jail Booking Record, Sergeant Shaw explained that Inmate Pichardo was booked as a female and her gender was later manually changed to a male.

(Investigator's Note: The gender change on the Jail Booking Record appears to have been made by Corporal Yolanda Hannah, Badge #4802, at 2:20 a.m.)

On November 5, 2013, Sergeant Shaw generated Incident Report #F13-011099B, after being alerted by Corporal Dwayne Pinder, Badge

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#5480, of Inmate Pichardo's family presence in the Front Lobby requesting an explanation as to why Inmate Pichardo was being housed at MWDC. Sergeant Shaw reported to the Front Lobby and spoke with Inmate Pichardo's family, consisting of two (2) Hispanic males and one (1) female, who identified herself as Inmate Pichardo's daughter. The family assured him that Inmate Pichardo was a female. Sergeant Shaw immediately contacted MWDC Staffing Sergeant Renay Laborn, Badge #4488, and explained the possibility that a female was being housed at MWDC. Sergeant Shaw then called Unit #MW3A1 and advised Officer Tavaraz Carter, Badge #6150, a female may be housed in his unit but he (Carter) responded that Inmate Pichardo was in the Clinic; therefore, he (Shaw) called the Clinic, advised Officer Sheldon Evans, Badge #4686, of the situation and directed him to have two (2) female nurses conduct an assessment to confirm Inmate Pichardo's gender. According to Sergeant Shaw, Officer Evans later notified him (Shaw) that Inmate Pichardo's was a female. Sergeant Shaw contacted Sergeant Laborn at MWDC to advise her and generate an incident report. Subsequently, Inmate Pichardo was transported back to TGK and housed in Unit #K2-2, which is designated as a female unit.

Sergeant Shaw stated that according to the medical addendum which he later reviewed, a "Nurse Harris" at TGK had indicated that Inmate Pichardo had "male parts; therefore,

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Inmate Pichardo was classified and transferred to MWDC, a male facility. When asked explain the protocol if an officer doubted a medical staff's determination, he replied, "Well, to be honest with you we'd never had that arise before. But if an officer is in doubt, they can ask, um, the nurse can they please reevaluate her again. They can, ah, get a supervisor, a corporal or sergeant involved just to kinda like make sure that it is whatever sex that the nurse indicated" Sergeant Shaw stated that the final determination regarding Inmate Pichardo's gender had been made by medical staff.

Sergeant Shaw explained that during the Booking Process a new arrest arrives and enters TKG through the Law Enforcement Officer (LEO) Lobby, where a prescreening consisting of a vitals check and visual check for injuries is conducted by medical staff. The inmate is then escorted to the Booking Window where he/she is issued a jail number. The inmate enters the Rear Lobby where a mugshot photograph is taken, a pat down or strip search is conducted depending on the charges. All strip searches are conducted in the shower area. The inmate is then fingerprinted through the Live Scan machines and is then taken to the Property Window to turn their property in. Upon completion, the inmate sits in an open holding area waiting to be medically screened. According to Sergeant Shaw, barring any medical conditions the inmate is escorted to a housing unit; however, if an inmate requires further

evaluation they are escorted to see medical staff in Unit #K4-6. Sergeant Shaw acknowledged that both male and female inmates wait for the process in the same open holding area.

Regarding the strip search process, Sergeant Shaw explained that if during the process an inmate's gender is questionable a medical staff member and officer of the inmate's gender would be summoned into the strip search room to determine the actual gender. Sergeant Shaw later stated, "Well, working in the Rear Lobby you see a lot of, um, males that could pass for females and you see females that can pass for males..." On November 5, 2013, when he (Shaw) observed Inmate Pichardo being returned to TKG, she appeared to him to be a female. (See Official Record #12a- Witness Employee Statement and #17- Sworn Recorded Statement)

20. On December 13, 2013, at approximately 2:44 p.m., Sergeant Renay Laborn, Badge #4488, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB.

Sergeant Laborn is a twenty (20) year veteran, who has been assigned to MWDC for approximately three (3) months on the 2:00 p.m. X 10:00 p.m., shift.

Although she (Laborn) recognized Inmate Pichardo's booking photograph, she stated that she never met the inmate. She explained that the photograph had been provided to her and she was asked to verify if the inmate was housed at MWDC.

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Sergeant Laborn recalled that on an unknown date, while assigned as the Staffing Sergeant at MWDC, she received two (2) internal telephone calls approximately five (5) minutes apart. The first call originated from the Front Lobby at TGK and the second call from IRB at TGK. Both callers wanted to verify if Inmate Pichardo was being housed at MWDC. Once verification was made, Inmate Pichardo was immediately escorted down to the Clinic. According to Sergeant Laborn, Officer Evans later contacted her to notify her that medical staff confirmed Inmate Pichardo was a female. Inmate Pichardo was isolated in the Clinic, provided an Inmate/Witness Statement form, photographed and transported back to TGK. (See Official Record #12b- Witness Employee Statement and #17- Sworn Recorded Statement)

21. On December 19, 2013, Lieutenant Dion Butler, Badge #4973, of SIAB forwarded me, Sergeant Aguilera, email correspondence from Bill McKeon indicating approval to interview Corrections Health Services (CHS) medical staff. (See Case History and Official Record #9a-Email)
22. On January 2, 2014, at approximately 6:03 p.m., Officer Tambrinesha Randall, Badge #6553, rendered a sworn recorded statement to SIAB Sergeant Aguilera at TGK.

Officer Randall is a five (5) year veteran, who has been assigned to IRB on the 11:00 p.m. X 7:00 a.m. shift for approximately two and a half

(2 1/2) years. She has worked most positions within IRB.

Officer Randall recognized Inmate Pichardo's booking photograph and explained that in November of 2013, she observed her sitting in the open bay area located in the Rear Lobby; however, she never interacted directly with her (Pichardo). She (Randall) recalled on that evening being assigned to the Report Officer Position which is responsible for generating all reports for the Rear Lobby. Officer Randall observed Inmate Pichardo sitting with female inmates. She described her (Pichardo) as having "really strong features;" however, she thought she was a female. Officer Randall defined "strong features" to mean, "physical features like her face, like she, she was sitting with females so she was with the females but she had like a strong facial feature. But I mean that, anyone can have that, I mean you know."

Upon reviewing Inmate Pichardo's Jail Booking Record, Officer Randall stated that she had been initially booked as a female; however, the "F" representing female gender had been manually changed to "M" for male. According to Officer Randall, she became familiar with the situation because she had to enter the reports. She explained that when Inmate Pichardo was evaluated by a doctor or medical staff, it was determined that she (Pichardo) was a male.

Officer Randall recalled generating Incident Reports #F13-011073A to document that Inmate

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Pichardo's "characteristics was not usual of, of um his sexual appearance." Officer Randall explained the report was generated due to her (Pichardo) being booked as a female and the gender being later determined by medical staff to be male, which occurred when she was escorted to Unit #K4-6 to be evaluated and to ensure she did not need any immediate medication prior to being transferred out of the facility. Officer Randall explained that upon her (Pichardo) being returned to the Rear Lobby she (Randall) was informed that a "Nurse F. Harris" advised that Inmate Pichardo was a male and signed a relocation form. In addition, approximately twenty-five (25) minutes later Sergeant Regina Price, Badge #5589, notified Officer Randall that the sex needed to be changed in the booking information to reflect the correct sex as a male; therefore, Officer Randall generated Incident Report #F13-011073B.

Officer Randall explained that from MDCR standpoint, she was always treated as a female until the medical staff in Unit #K4-6 stated, "This is a man."

Officer Randall explained that if during a strip search an officer discovers the inmate is of the opposite gender, the search is discontinued, a supervisor and an officer of the inmate's gender would be summoned to continue with the strip search. However, if a doubt exists regarding the inmate's gender, medical staff member would be summoned and present during the strip search. Officer Randall further explained there have

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been occasions when male inmates have tucked and taped their genitals far back towards their anus to resemble female genitals.

In closing, Officer Randall acknowledged that correctional staff does not have the authority to overrule the medical staff specifically, when medical staff determines an inmate's gender. In regard to Inmate Pichardo, she (Randall) was also informed that the inmate was taking some type of hormone pills. (See Official Record #12c-Witness Employee Statement and #17- Sworn Recorded Statement)

23. On January 2, 2014, CHS medical records for Inmate Pichardo were received and reviewed. The medical records reflect the following: (See Official Record #9b- CHS Medial Records)
 - a. Agency Advisory Form, dated November 4, 2013, at 5:30 p.m., did not reflect symptoms or problems reported by the arresting agency, Miami-Dade Police Department (MDPD).
 - b. CHS Pre-Screening Assessment form, dated November 4, 2013, at 6:44 p.m. under comments, "Menopause Medical." It also reflects for question #4 she takes "Ativan (Hormone replacement)."
 - c. CHS Master Problem List reflects an entry, dated November 5, 2013, which reflects, "male on hormone treatment (transgender).
CHS Master Problem List reflects an entry dated November 5, 2013, which reflects, "psych."

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- d. CHS Physical Assessment form, dated November 5, 2013, at 2:00 a.m., reflects by the Genital-Urinary System category, “deferred.”
- e. CHS Internal Referral form reflects, “Pt ref to psych for eval.”
- f. CHS Progress Record notations reflect that on November 5, 2013, at 5:45 a.m. Inmate Pichardo stated to CHS staff, “No, I have all my genital I was born with.”

Additionally, a second notation reflects, “Inmate has features of a female but she’s a male ~~has the genital parts as a man.~~” Over the words struck through, it reflects, “Per Inmate.”

Additionally, a third notation reflects, “Inmate told corrections he was a female.”

- g. CHS Progress Record notations reflect that on November 5, 2013, at 7:00 p.m., Inmate Pichardo had been transferred to MWDC from TGK. Inmate Pichardo stated to medical staff at MWDC. “I am female and have 3 children.” Subsequent to MDCR’s request, an assessment was conducted and CHS staff determined that Inmate Pichardo was a female with “female features and female genitalia.
- h. The Physician’s Order Sheet entry, dated November 5, 2013, at 10:30 p.m., reflects, “Please transfer pt to female population. Please notify correction.”

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- i. CHS Psychiatric Progress Note form, dated November 6, 2013, at 10:07 a.m., reflects Inmate Pichardo, "50 yo - HF - Dominican - married - 3 children arrested 11/4/13 on charges of Trafficking from 25 years ago."
 - j. CHS Mental Health/Medical Relocation form, dated November 6, 2013, relocates Inmate Pichardo to general population.
 - k. CHS Mental Health/Medical Relocation form, dated November 6, 2013, at 10:00 a.m., relocates Inmate Pichardo to general population. It also reflects that she was cleared by ARNP Jose Ponce for transport.
 - l. CHS Progress Record notations reflect that on November 6, 2013, at 9:14 a.m., Inmate Pichardo was on hormone replacement per her gynecologist for menopause.
 - m. The Physician's Order Sheet entry, dated November 6, 2013, at 9:15 a.m. reflects, Inmate Pichardo should return to the Clinic in two (2) days for evaluation of the Hormone Replacement Therapy (HRT).
24. According to WebMD.com, the medications listed within Inmate Pichardo's CHS Medical Records are as follow:
- a. Lisinopril is an ACE inhibitor to treat blood pressure and/or heart failure.
 - b. Tylenol is used to treat fever and/or pain.
 - c. Ativan is a sedative to treat anxiety.

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- d. Ibuprophen is a pain reliever also used to treat fevers.
- e. Zantac is used to reduce stomach acid and treat ulcers.
- f. Vistaril is a sedative used to treat anxiety and tension.
- g. Acetaminephen is used for fever and/or pain).

Additionally, the acronym “HRT” is defined as a hormone replacement therapy which refers to the use of estrogen plus progestin for the treatment of perimonopausal symptoms. (See Official Record #14- WebMD.com printouts)

25. On January 2, 2014, at approximately 7:07 p.m., CHS Nurse Annette Maynard rendered a sworn recorded statement to SIAB Sergeant Aguilera at MWDC. Nurse Maynard stated the following:

Nurse Maynard is assigned to MWDC on the afternoon shift.

Nurse Maynard recognized Inmate Pichardo’s booking photograph as an inmate, whose gender she had been asked to verify. Upon initially approaching Inmate Pichardo, Nurse Maynard’s first impression was that she (Pichardo) was a female. She explained that Inmate Pichardo spoke Spanish and she could not communicate with her; therefore, she asked Nurse Amira De La Espriella to interpret for her. Nurse Maynard had Inmate Pichardo remove her “lacey” and “silk” underwear and bend over and squat in order to visually verify Inmate Pichardo’s gender. Nurse Maynard stated that

Inmate Pichardo did not have male genitals and “nothing dropped.” Nurse Maynard verified that Inmate Pichardo’s gender is female. In addition, Nurse Maynard gathered from Inmate Pichardo’s response to her questions that she (Pichardo) was a mother of two (2) or three (3) children and was taking hormone pills for menopausal treatment. According to Nurse Maynard, Inmate Pichardo did not appear to be a transsexual. (See Official Record #13a-Witness Employee Statement and #17- Sworn Recorded Statement)

26. On January 2, 2014, at approximately 7:23 p.m., Officer Sheldon Evans, Badge #4686, rendered a sworn recorded statement to SIAB Sergeant Aguilera at MWDC. Officer Evans stated the following:

Officer Evans is a twenty (20) year veteran, who is currently assigned to the North Clinic at MWDC on the 3:00 p.m. X 11:00 p.m. shift.

Officer Evans recognized Inmate Pichardo’s booking photograph as an inmate from MWDC. He (Evans) recalled that on November 5, 2013, he received a telephone call from Sergeant Shaw instructing him to have Inmate Pichardo taken down to the Clinic to be evaluated by medical staff in order to confirm the inmate’s gender. According to Officer Evans, Inmate Pichardo was already in the Clinic for health appraisal or sick call; therefore, she was isolated in a Clinic Holding Cell. While standing behind a partition wall, Nurse Annette Maynard and Nurse Amira

De La Espriella asked her (Pichardo) to remove her clothing and visually verify that she (Pichardo) had female genitalia. Inmate Pichardo remained in the Holding Cell isolated from the male inmates until she was returned to TKG.

Officer Evans stated that he provided Inmate Pichardo an Inmate/Witness Statement form which he later retrieved. He explained that statement was written in the Spanish language, which later had to be translated by another officer. He (Evans) denied that Inmate Pichardo had at any time alleged that she had been raped or assaulted.

Officer Evans stated, "I've seen plenty of so called transvestites, but we rarely question it because we figure it was determined at Booking what, what they (sic) gender is, is, is really is and what facility they can go to." (See Official Record #12d- Witness Employee Statement and #17- Sworn Recorded Statement)

27. On January 2, 2014, at approximately 7:46 p.m., Corporal Travarri Johnson, Badge #5898, rendered a sworn recorded statement to SIAB Sergeant Aguilera at MWDC. Corporal Johnson stated the following:

Corporal Johnson is an eight (8) year veteran assigned to MWDC on the 3:00 p.m. X 11:00 p.m., shift. He is routinely assigned to 3A-Wing.

Corporal Johnson recognized Inmate Pichardo's booking photograph as an inmate who had been housed in 3A-Wing. He recalled observing her

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sitting on the blue chairs located across from the officer's desk. He described her as appearing "calm, relaxed."

Corporal Johnson also recalled entering the Unit #MW3A1, observing Inmate Pichardo standing in line among other inmates being moved, and directing her to the front of the line with the officer because he thought she was a transgender inmate. The purpose of having her move to the front of the line was to prevent any altercation from occurring.

On November 5, 2013, at approximately 7:30 p.m., upon being directed to generate an incident report transferring Inmate Pichardo back to TKG, he learned that she was a female. (See Official Record #12e- Witness Employee Statement and #17- Sworn Recorded Statement)

28. On January 2, 2014, at approximately 8:05 p.m., Officer Tavarez Carter, Badge #6150, rendered a sworn recorded statement to SIAB Sergeant Aguilera at MWDC. Officer Carter stated the following:

Officer Carter is a six and half (6 ½) year veteran assigned to MWDC on the 3:00 X 11:00 p.m. shift. During November of 2013, Officer Carter was assigned to Transit Unit #MW3A1.

Officer Carter recognized Inmate Pichardo's booking photograph as an inmate, who on November 5, 2013, was housed in Unit #MW3A1. According to Officer Carter, after he conducted headcount Inmate Pichardo returned

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to her assigned Bunk #2 where she remained for the rest of his shift.

Officer Carter stated that Inmate Pichardo never approached him to tell him that she was a female, or to allege being sexually assaulted. He recalled watching Inmate Pichardo sit up on her bunk and look around the unit as "it was almost like she was afraid to get off, off the bunk." He (Carter) recalled that she had gotten up, approached the front of the officer's desk, looked at the television and returned to her bunk. During dinner, Inmate Pichardo gave her tray away.

Officer Carter explained that when a male inmate looks like a female, they are placed near the front door as a measure of protection. Placing the inmate near the front door allows the officers to maintain a visual of the inmate and to "make sure nobody messes with them or what have you."

Later that evening Officer Carter received a telephone call from the Clinic with a list of nine (9) inmates, including Inmate Pichardo, who needed to be sent down to the Clinic. Inmate Pichardo was sent down to the Clinic as part of the group but never returned. Officer Carter was later notified by the Clinic Officer Evans and the shift lieutenant that Inmate Pichardo was identified as a female and being transferred back to TKG. (See Official Record #12f- Witness Employee Statement and #17- Sworn Recorded Statement)

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29. On January 3, 2014, at approximately 10:36 a.m., Officer Kimberly Jones, Badge #5996, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB.

Officer Jones has been employed by MDCR for seven (7) years. She has been assigned to IRB for approximately six (6) years and she is currently assigned to the 7:00 a.m. X 3:00 p.m. shift.

Officer Jones was working overtime on November 5, 2013, on the 11:00 p.m. X 7:00 a.m., shift. She was assigned to the Rear Lobby.

Officer Jones recognized Inmate Pichardo's booking photograph as an inmate from TKG, who she escorted from the Rear Lobby to Unit #K4-6 to be seen by medical staff. The reason she escorted her (Pichardo) was due to medical concerns but not for a gender determination. Officer Jones stated up until that point, Inmate Pichardo's gender had been female and she was processed as a female. According to Officer Jones, while being evaluated in Unit #K4-6, the doctor determined that Inmate Pichardo was a male. Officer Jones then stated, "To me, it was Nurse Harris. I never spoke with the doctor." Officer Jones acknowledged that a doctor was in Unit K4-6 on that evening.

According to Officer Jones, upon returning to Unit #K4-6 to escort inmates back to the Rear Lobby, she was advised by the unit officer that Inmate Pichardo was a male. Officer Jones did

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not recall the name of the officer assigned to the unit.

Officer Jones stated that she asked Nurse Harris if Inmate Pichardo had been physically checked. Officer Jones defined “physically checked” to mean strip searched or if she had the officer strip search the inmate to determine if she was a male. According to Officer Jones, after she asked Nurse Harris two (2) or three (3) times if Inmate Pichardo had been checked, she (Harris) replied, “She’s a man.”

Officer Jones escorted Inmate Pichardo back to the Rear Lobby along with her medical chart. She had her sit just outside of the Shift Commander’s Office on a row by herself with no one in front of her but female inmates. The purpose of having her sit by herself was because she felt Inmate Pichardo was a female and she wanted to speak with her supervisor, Sergeant Regina Price, Badge #5589, to advise her that Nurse Harris had determined that Inmate Pichardo was a male. Sergeant Price later advised her to notify the Booking Unit to have her gender changed. According to Officer Jones, Inmate Pichardo did not speak English and was quiet during the escort downstairs but she did understand her to say that she was tired and had a headache.

Officer Jones later learned that Inmate Pichardo was not a male but a female and had been sent to MWDC; therefore, upon returning to work on

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November 5, 2013, she generated an Incident Report #F13-011099C.

From her (Jones) experience, if during the strip search of a female inmate the gender becomes questionable the search is stopped and an officer of the same gender and medical staff is summoned to continue the strip search. Officer Jones stated that the Rear Lobby staff determines the gender during the strip search; however, when in doubt medical staff would make the determination. (See Official Record #12g- Witness Employee Statement and #17- Sworn Recorded Statement)

30. On January 3, 2014, at approximately 1:39 p.m., Officer Audrey Morman, Badge #6494, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB. Officer Morman stated the following:

Officer Morman has been employed by MDCR for four (4) years and assigned to IRB for approximately three (3) years.

Officer Morman recognized Inmate Pichardo's booking photograph. She recalled that on an unknown date in November of 2013, she (Morman) had seen Inmate Pichardo in Unit #K4-6, which is designated as a detoxification cell and where inmates needing medical attention beyond medical screening are escorted to see a doctor or nurse. Officer Morman recalled she (Pichardo) arrived to Unit #K4-6 handcuffed along with other female inmates. Officer

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Morman secured the females in a cell pending evaluation by medical staff.

While at the Officer's Desk, Nurse Harris approached her (Morman) and questioned her about Inmate Pichardo being a male. Officer Morman explained that Inmate Pichardo was not present during the conversation and Nurse Harris had not seen her (Pichardo). According to Officer Morman, Nurse Harris only had Inmate Pichardo's medical file, which reflected she was taking hormone pills. Nurse Harris told her, "This what male inmates take to enhance breasts." Officer Morman replied that Inmate Pichardo looked like a female, and the blue tab reflected her gender as female. Nurse Harris replied that she would check her out and they proceeded to walk toward the cell. Inmate Pichardo only spoke Spanish, so Nurse Harris communicated with her in Spanish. According to Officer Morman, Inmate Pichardo's facial expressions appeared to be offended. So she asked Nurse Harris what she asked her and Nurse Harris replied that she asked her if she was a female and if she had female parts to which Inmate Pichardo replied affirmatively twice. Nurse Harris then walked away and into the Doctor's Room with Inmate Pichardo, where they remained for approximately five (5) minutes. Officer Morman did not have a visual of the room; therefore, she could not explain what occurred inside the room. Upon exiting, Nurse Harris told her (Morman), "everything fell out" and explained that the penis and testicles

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fell out. Officer Morman was surprised because Inmate Pichardo appeared to be a female. Officer Morman then looked at her charges and checked to see who strip searched her downstairs because if she was a male with a penis and testicles it should have been caught downstairs. Based on medical staff's determination that Inmate Pichardo was a male, Officer Morman notified her supervisor and had the inmate escorted back downstairs separately.

Officer Morman later explained that she did not know if the doctor was actually physically in the room but the manner in which Nurse Harris spoke to her and said "saw everything" led her to believe that the doctor was in the room.

According to Officer Morman, normally an officer and nurse are present during a strip search to verify an inmate's gender; however, she (Morman) denied strip searching Inmate Pichardo or being asked by medical staff to strip search her.

Officer Morman stated that she later received telephone calls from Sergeant Price and Officer Randall telling her to make sure she obtained a Health Services Incident Addendum from the nurse. Officer Morman asked Nurse Harris for the Health Services Incident Addendum, which was provided to her, dated November 5, 2013, at 2:00 a.m. Upon reviewing the Health Services Incident Addendum associated with Incident Report F13-011073A, she acknowledged that the form was the same form Nurse Harris provided

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her and on which she (Harris) had written "Transgender, male parts, female tendencies."

Officer Morman explained that she worked overtime on the midnight shift and later on the day shift, she observed Inmate Pichardo sitting in the Rear Lobby crying and appeared to be nervous. She had been separated from the male and female inmates.

According to Officer Morman, from her knowledge of working IRB if an officer encounters a situation during a strip search involving an inmate of questionable gender, the officer must notify their supervisor and summon medical staff to verify the gender.

Officer Morman explained that she later learned that Inmate Pichardo was a female from watching it on the local news. Approximately one (1) week later she saw Nurse Harris in the Rear Lobby and asked her what happened; that she had told her Inmate Pichardo was a male. According to Officer Morman, Nurse Harris replied that she was the laughing stock of Corrections and Jackson. Nurse Harris also told her that she was just going by what the doctor told her because she was not even there. Nurse Harris also told her that it was the doctor's word against her word because his name was not on anything. Officer Morman stated that Nurse Harris told her that it had been a big mistake on her part from which she had learned a lesson.

Officer Morman did not know the doctor's name; however, she described him as being an older

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and medium built Hispanic with salt and pepper hair. (See Official Record #12h- Witness Employee Statement and #17- Sworn Recorded Statement)

31. On January 7, 2014, at approximately 1:12 p.m., Corporal Dwayne Pinder, Badge #5480, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB. Corporal Pinder stated the following:

Corporal Pinder is a twelve (12) year veteran currently assigned to the Court Services Bureau (CSB). On November 5, 2013, on the 3:00 p.m. X 11:00 p.m. shift, Corporal Pinder worked overtime at IRB as the Release Supervisor.

Corporal Pinder recognized Inmate Pichardo's booking photograph. He explained that Inmate Pichardo's family, which consisted of two (2) males and one (1) female approached him and said they had been in the Front Lobby all day trying to find out why she (Pichardo), being a female, was housed at MWDC. Corporal Pinder also recognized Mrs. Amanda Maria Veloz's photograph. He identified her as Inmate Pichardo's daughter.

Corporal Pinder researched the matter and located two (2) reports regarding Inmate Pichardo. One of the incident reports indicated that Inmate Pichardo had been seen by medical staff, who determined she had nontraditional organs or that basically she was not considered born a female. Corporal Pinder contacted Sergeant Shaw, who investigated the matter

further. He (Pinder) also advised the family that the matter was being investigated. Sergeant Shaw later advised him (Pinder) that Inmate Pichardo was a female. (See Official Record #12i-Witness Employee Statement and #17- Sworn Recorded Statement)

32. On January 7, 2014, at approximately 2:12 p.m., Corporal Yolanda Hannah, Badge #4802, rendered a sworn recorded statement to SIAB Sergeant Aguilera at SIAB. Corporal Hannah stated the following:

Corporal Hannah is an eighteen (18) year veteran, who is currently assigned to IRB at TGGK on a variable shift.

Corporal Hannah recognized Inmate Pichardo's booking photograph as an inmate from TGGK. The only interaction she had with Inmate Pichardo was to "QRU" her on the date she was released to the United States Marshals (USM). However, she recalled that on November 5, 2013, while assigned to the Booking Area on the midnight shift Officer Kimberly Jones, Badge #5996, approached her to inform her that an incident report was being generated and that per Sergeant Price, Inmate Pichardo's gender needed to be changed in the Criminal Justice Information System (CJIS) from female to male. Corporal Hannah signed on to CJIS and changed the gender from female to male; however, she denied actually making the manual correction on the Jail Booking Record and did not know who had done so. Corporal Hannah explained

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that it was standard procedure not to reprint the Jail Booking Record for minor changes but rather write over the information being changed. Corporal Hannah stated that she was not told who made the determination, except that “it was coming from upstairs in 4-6 with the medical doctor. They never said what doctor. They never said, you know, who, specific names or anything like that. They just said it was discovered upstairs in 4-6, which is the medical...”

(Investigators Note: The acronym “QRU” is defined as positively identify the individual.)

Corporal Hannah explained that during a routine strip search if it is discovered or an inmate’s gender is questionable, medical staff would be brought in to make the final gender determination. (See Official Record #12j-Witness Employee Statement and #17- Sworn Recorded Statement)

33. By comparing video footage with the Inmate In Particular Cell printout and booking photographs, Inmate Joel Leon, Jail #130068188, was identified as the inmate who Inmate Pichardo appeared to gravitate towards and speak with while in Unit #MW3A1.

On February 12, 2014, I, Sergeant Aguilera, attempted to interview Inmate Leon at MWDC; however, he refused to provide a recorded statement. During the pre-interview, Inmate Leon stated that he had no information to contribute to this investigation. Inmate Leon did recognize Inmate Pichardo’s booking photograph

and recalled that her (Pichardo) primary concern was to call her family but the PIN number did not work. According to Inmate Leon, during the hours Inmate Pichardo was in Unit #MW3A1, for the most part she remained on her bunk located near the door. Inmate Pichardo was called down to the Clinic with the diabetics but never returned to the unit. (See Case History)

34. On February 18, 2014, at approximately 4:48 p.m., Officer Courtney Carpenter, Badge #5981, rendered a sworn recorded statement to SIAB Sergeant Jose Toca, Badge #3548, at SIAB. Officer Carpenter stated the following:

Officer Carpenter is a twelve (12) year veteran, who has been assigned to IRB for approximately five (5) years. Her primary assignments consist of performing pat down searches, strip searches, fingerprinting and generating incident reports.

Upon reviewing the IRB Duty Roster for the 3:00 p.m. X 11:00 p.m., shift, dated November 4, 2013, Officer Carpenter acknowledged being on duty and assigned to fingerprinting newly arrested inmates. Officer Carpenter acknowledged that she also assisted other areas with pat down and strip searches.

Officer Carpenter reviewed MDCR document titled, "Departmental Strip Search Authorization Log, dated November 4, 2013, and acknowledged that based on her signature by Inmate Pichardo's name, she had strip searched her. Upon reviewing the booking photographs, Officer Carpenter recalled strip searching

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Inmate Pichardo on the date that she was booked. Officer Carpenter recalled that Inmate Pichardo was “upset” and “distraught” and she had to speak to her to calm her down and explain the process through Officer Wilson Vega, Badge #5809, who spoke Spanish because she (Pichardo) did not speak English. Officer Carpenter stated that Inmate Pichardo did not convey anything unusual through Officer Vega.

Officer Carpenter initially performed a pat down search, which she described as being a “regular pat search.” She then escorted Inmate Pichardo to the Strip Search Area and described the strip search as, “Just a normal strip search. Telling her to take off her clothing. She has to pass me her bra, underwear. She had to, basically, lift her arms, turn around, bend over at the waist, grab her butt checks, spread, cough. And then I gave her clothing and she got dressed.” Officer Carpenter later explained that the strip search process requires her to look at the inmate’s body ensuring nothing is inserted up the reproductive area, taped to the body or hidden. Officer Carpenter issued Inmate Pichardo an orange inmate uniform, escorted her to the Property Window and then to the Lobby where she showed her where the telephones were located and directed her to sit with other female inmates. (See Official Record #12k- Witness Employee Statement and #17- Sworn Recorded Statement)

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35. A review of Global Tel Link (GTL) did not reveal any recorded calls placed by Inmate Pichardo while in MDCR custody. (See Case History)

In addition, there were no recorded calls placed by Inmate Leon, on November 5, 2013, between 12:40 p.m. and 6:45 p.m. while Inmate Pichardo was housed in Unit #MW3A1; however, he did attempt four (4) failed calls to telephone #786-218-7874. GTL reflects the calls failed due to fingerprint validation failure. (See Case History)

36. ViconNet archives downloaded and reviewed, which consisted of video footage of TGK, IRB and MWDC, for the period of November 4, 2013, through November 5, 2013, captured Inmate Pichardo from the time of her arrival at TGK through the booking process and during her stay at MWDC. In order to condense the extensive amount of footage gathered from the archives, four (4) Window Media Videos (wmv) were created capturing Inmate Pichardo. The footage reflected the following:

<u>Date and Time</u>	<u>Observations:</u>
<u>November 4,</u> <u>2013</u> 6:35 p.m.	Inmate Pichardo arrived in the Sallyport escorted by two (2) MDPD Police Officers. (Refer to Intake Process Video)
6:38 p.m.	Inmate Pichardo entered the LEO Lobby. While in the LEO Lobby she was issued a jail number and went through a pre-screening process. (Refer to Intake Process Video)

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7:04 p.m.	Inmate Pichardo's mugshot taken. (Refer to Booking Process Video)
7:12 p.m.	Inmate Pichardo was strip searched by female Officer Carpenter. Process appeared to be routine and without incident. (Refer to Bookino Process Video)
7:24 p.m.	Inmate Pichardo was fingerprinted. (Refer to Booking Process Video)
7:26 p.m.	Inmate Pichardo sits among other female inmates in the Rear Lobby. (Refer to Bookino Process Video)
8:02 p.m.	Inmate Pichardo is medically screened. (Refer to Booking Process Video)
8:07 p.m.	Inmate Pichardo returned to Rear Lobby and sits among other female inmates. (Refer to Bookino Process Video)
11:52 p.m.	Inmate Pichardo is handcuffed with other female inmates and is escorted upstairs to Unit #K4-6. (Refer to Booking Process Video)
<u>November 5, 2013</u> 12:00 a.m.	Inmate Pichardo arrives to Unit #K4-6. (Refer to Arrival to Unit #K4-6 Video)

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2:14 a.m.	Inmate Pichardo departs from Unit #K4-6. (Refer to Arrival to Unit #K4-6 Video)
12:17 a.m.	Inmate Pichardo arrives in the Rear Lobby being escorted Officer Jones, where she (Pichardo) is directed to sit in empty row between male and female inmates. (Refer to Arrival to Unit #K4-6 Video)
12:01 p.m.	Inmate Pichardo departs TGK in route to MWDC. (Refer to MWDC Video)
12:43 p.m.	Inmate Pichardo enters Unit #MW3A1 and sits on blue chairs. (Refer to MWDC Video)
12:58 p.m.	Inmate Pichardo stands up by blue chairs and speaks with Inmate Leon and shows him some papers. (Refer to MWDC Video)
12:59 p.m.	Inmate Pichardo and Inmate Leon sit down on blue chairs and continue conversation. (Refer to MWDC Video)

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1:21 p.m.	Inmate Leon stands up and walks towards telephones. Inmate Pichardo stands up, walks towards Igloo for water and then walks towards telephones where Inmate Leon was located. (Refer to MWDC Video)
1:22 p.m.	Inmate Pichardo walks in direction of the officer's desk then returns to and sits on blue chairs. (Refer to MWDC Video)
1:32 p.m.	Inmate Pichardo walks toward telephones and speaks with Inmate Leon. (Refer to MWDC Video)
1:42 p.m.	Inmate Pichardo returned and sat on blue chairs. (Refer to MWDC Video)
1:44 p.m.	Inmate Pichardo walked toward officer's desk, handed officer a paper, and stood and waited. (Refer to MWDC Video)
1:46 p.m.	Inmate Pichardo returned and sat on blue chairs. (Refer to MWDC Video)
1:47 p.m.	Inmate Pichardo stood up and spoke with Inmate Leon by blue chairs. (Refer to MWDC Video)

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1:49 p.m.	Inmate Leon walked away and Inmate Pichardo sat in blue chairs. (Refer to MWDC Video)
1:52 p.m.	Unknown White male inmate sat next to Inmate Pichardo by blue chairs and they held a conversation. (Refer to MWDC Video)
1:57 p.m.	Inmate Leon walked toward and sat on blue chairs to speak with Inmate Pichardo and unknown male. (Refer to MWDC Video)
2:20 p.m.	Inmate Pichardo was issued linen. She then walked toward Bunk #2, located near the front door and made her bed. (Refer to MWDC Video)
2:29 p.m.	Inmate Pichardo entered the bathroom. (Refer to MWDC Video)
2:30 p.m.	Inmate Pichardo exited bathroom and returned to her bunk where she sat on her bunk. (Refer to MWDC Video)
2:57 p.m.	Inmate Pichardo stood by her bunk while headcount was being conducted. (Refer to MWDC Video)
2:58 p.m.	Inmate Pichardo sat on her bunk and later lay down. (Refer to MWDC Video)

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3:19 p.m.	Inmate Pichardo stood up by her bunk, while a Black male inmate made her bunk. (Refer to MWDC Video)
3:20 p.m.	Inmate Pichardo lay down on her bunk. (Refer to MWDC Video)
5:16 p.m.	Inmate Pichardo got up from bunk and walked to the bathroom. She stood at bathroom entrance for approximately thirty-five (35) seconds prior to entering. (Refer to MWDC Video)
5:18 p.m.	Inmate Pichardo exited bathroom and returned to her bunk, where she stood for approximately twenty (20) seconds before laying down again. (Refer to MWDC Video)
5:40 p.m.	Inmate Pichardo got up from her bunk and walked toward the telephones. She looked around for someone. She then approached and spoke with Inmate Leon near the telephones but in the dayroom area. (Refer to MWDC Video)
5:41 p.m.	Inmate Pichardo followed Inmate Leon towards the telephones. (Refer to MWDC Video)

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5:43 p.m.	Inmate Pichardo returned to her bunk, retrieved papers and walked back to telephones to give papers to Inmate Leon. She then sits next to Inmate Leon as he is on the telephone. (Refer to MWDC Video)
5:49 p.m.	Inmate Pichardo returned to her bunk and sat down. (Refer to MWDC Video)
6:04 p.m.	Inmate Pichardo takes her dinner tray and returns to her bunk. (Refer to MWDC Video)
6:24 p.m.	Inmate Pichardo got up and walked toward the telephones, where she stood speaking with Inmate Leon. (Refer to MWDC Video)
6:41 p.m.	Inmate Pichardo walked toward her bunk. She then walked toward the Commissary Kiosk and returned to her bunk. (Refer to MWDC Video)
6:44 p.m.	Inmate Pichardo got up and walked toward the officer's desk where she stood near the Commissary Kiosk. (Refer to MWDC Video)

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6:45 p.m.	Inmate Pichardo returned to her bunk where she sat on her bunk and spoke with an unknown white male inmate. There appeared to be a distance between them as they sat on the bunk talking. (Refer to MWDC Video)
6:47 p.m.	Inmate Pichardo stood in line by the front unit door with seven (7) male inmates and exited the unit. (Refer to MWDC Video)
6:48 p.m.	Inmate Pichardo entered the elevator along with seven (7) inmates but stood by Sick Call Officer Bradley Hluchan, Badge #6082. (Refer to MWDC Video)
6:49 p.m.	Inmate Pichardo exited the elevator along with seven (7) inmates but Officer Hluchan directed Inmate Pichardo to remain with him at the end of line as they walk down the SMU-North/Clinic Hallway. (Refer to MWDC Video)
6:50 p.m.	Inmate Pichardo entered the North Clinic along with seven (7) male inmates and walk out of monitor's view escorted by Officer Hluchan. (Refer to MWDC Video)

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6:56 p.m.	North Clinic Officer Evans received a telephone call. (Refer to MWDC Video)
6:57 p.m.	North Clinic Officer Evans received second telephone call stood up and walked in the directions inmates had walked into Clinic but which was out of any monitor's view. (Refer to MWDC Video)
6:58 p.m.	North Clinic Officer Evans walked toward officer's desk and answered a third (3 rd) telephone call. (Refer to MWDC Video)
6:58 p.m.	Inmate Pichardo is escorted and secured in Clinic Holding Cell. (Refer to MWDC Video)
6:59 p.m.	Nurse Maynard entered Clinic Holding Cell. Officer Evans walked toward desk and made a telephone call and Officer Hluchan exited the Clinic. (Refer to MWDC Video)
7:01 p.m.	Officer Evans hands Nurse Maynard a red folder. (Refer to MWDC Video)
7:02 p.m.	Nurse De La Espriciella entered Clinic Holding Cell. Officer Evans remained at the Cell's doorway. (Refer to MWDC Video)

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7:05 p.m.	Officer Evans walked to his desk and made a telephone call. Inmate Pichardo remained in the holding cell. (Refer to MWDC Video)
7:36 p.m.	Nurse De La Espriciella stood at holding cell doorway. (Refer to MWDC Video)
7:38 p.m.	Nurse De La Espriciella walked away toward water fountain. (Refer to MWDC Video)
8:23 p.m.	Inmate Pichardo exited North Clinic escorted by Sergeant Terrance Hamilton, Badge #5158, and Corporal Yvonne Challenger, Badge #4452. (Refer to MWDC Video)
8:24 p.m.	Inmate Pichardo departs MWDC escorted by Sergeant Hamilton and Corporal Chanllenger. (Refer to MWDC Video). (Refer to MWDC Video)

The video footage did not reflect Inmate Pichardo being sexually assaulted while in MDCR custody, which she confirmed in her Inmate/Witness Statement and during the recorded sworn interview. (See Official Record #17- Window Media Videos)

37. On March 20, 2014, CHS Medical Assistant Vanshae Ingraham confirmed with the JMS Scheduling System that Doctor Fredesvindo

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Rodriguez-Garcia, was assigned to Medical Screening on November 5, 2013, during the 11:00 p.m. X 7:00 a.m. shift. Additionally, she confirmed that JMS Scheduling System also reflected Doctor Rodriguez-Garcia being out on Personal Leave through March 31, 2014. (See Case History)

38. On March 20, 2014, at approximately 11:24 p.m., Charge Nurse Dafton James provided Sergeant Aguilera a sworn recorded statement at TGK. Charge Nurse James stated the following:

Nurse James has been employed by JMH for approximately twenty-three (23) or twenty-four (24) years. Since November 2013, he has been assigned to TGK.

Nurse James recognized Inmate Pichardo's booking photograph; however, he explained that he had never met her in person because he was off duty when she (Pichardo) passed through TGK. Upon returning from scheduled days off, he was asked by his supervisor to generate a confidential incident report concerning the situation regarding the patient (Pichardo). Consequently, he (James) reviewed Inmate Pichardo's CHS medical records and identified the screening staff, social worker and doctor, who evaluated Inmate Pichardo. Nurse James stated that he could not disclose the names and referred me, Sergeant Aguilera, to JMH Human Resources to obtain a copy. According to Nurse James, the incident report identifies the screening nurse, the social worker and the

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medical provider who evaluated the patient. Additionally, he (James) also spoke to the nurse at MWDC. However, when asked who decided the patient (Pichardo) was a male rather than a female as she was booked, he (James) replied that he believed it was either the social worker or the medical provider. He stated, "It was between both of them where the uncertainty was concerned, the gender uncertainty was concerned. I think the uhm the social worker was a little bit confused and certainly the doctor didn't do a proper assessment or review or whatever to rule out the gender. So, that's as far as I can mention. I don't know anything else."

Nurse James later identified Social Worker Bobby Marshall. He stated that the unnamed provider (doctor) is, "Pretty much new. He's still here. Sorry. He works on 3:00 p.m. X 11:00 p.m. and I don't know his name." However, he did later explain that on the evening patient (Pichardo) was booked, the provider had probably worked on the 11:00 p.m. X 7:00 a.m. shift. Nurse James described the provider as being a short, Hispanic male, with white hair.

Nurse James explained that an inmate's gender is determined through various stages. Initially, the inmate's word is taken as to their gender. The second stage occurs during the intake process by a screening nurse performing a visual inspection. The medical screener requests correctional support at which time both the screening nurse and correctional officer would perform a strip search to visually inspect the

genitalia. Nurse James explained that the medical screening process is not fully completed until the inmate's gender is determined. Additionally, when the patient is escorted to see the practitioner, he or she should rule out the gender by means of a visual inspection. When asked if the processes he had explained had been conducted, he replied, "I am not sure if the process was followed through, uhm." He explained that the records did not provide that it was conducted during the screening process and did not recall if the process had been followed by the practitioner.

Nurse James did not recall if the patient's (Pichardo) medical records reflected whether or not she was on hormone therapy. He (James) explained that from his experience, hormone replacement therapy (HRT) can be taken by both genders due to depletion of a person's hormone system or to treat low sex drive and certain types of cancers; however, he stated that he was not clear of the use by transsexuals. (See Official Record #13b- Witness Statement Form and #17- Sworn Recorded Statement)

39. On March 21, 2014, at approximately 12:04 a.m., Nurse Fatu Kamara-Harris provided Sergeant Aguilera a sworn recorded statement at TGK. Nurse Kamara-Harris stated the following:

Nurse Kamara-Harris has been a nurse for twenty-four (24) years. In August of 2013, she was assigned to TGK; however, she has worked within the correctional setting as an agency

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nurse and currently as a JMH employee. Nurse Kamara-Harris is assigned to the 11:00 p.m. X 7:00 a.m. shift. She has been assigned to Medical Housing, Intake Screening, Medical Screening, Detoxification Unit #K4-6 and the Clinic. On occasion, she has also been designated as a charge nurse. Nurse Kamara-Harris stated that she only speaks English and denied speaking Spanish, except, to be able to assess a level of pain.

Nurse Kamara-Harris explained that newly arrested inmates go through a pre-screening process which is followed by a medical screening process conducted by a registered nurse at which point the inmate may be referred to a social worker. The inmate may then be escorted to Unit #K4-6 to be seen by a practitioner, who is generally a doctor; however, there have been rotations during which an Advanced Registered Nurse Practitioner (ARNP) has been assigned.

Nurse Kamara-Harris recognized Inmate Pichardo's booking photograph as one of several female inmates being held in a room inside of Unit #K4-6 waiting to be seen by a provider on an unrecalled date. She explained that the room was located adjacent to the practitioner's office and Inmate Pichardo was already inside the room upon her arrival for duty.

Nurse Kamara-Harris recalled that Inmate Pichardo had been sent to see the practitioner regarding a history of high blood pressure. Nurse Kamara-Harris explained that the

environment, conditions and what the inmate is going through has a tendency to raise their blood pressure.

Nurse Kamara-Harris also recalled that Inmate Pichardo's "blue tab" reflected a "hand written gender saying male not female." She stated that the blue tab reflected the word "male" and not "M" for gender. Nurse Kamara-Harris believed the word "male" was underlined and stated that she found it strange. During her (Kamara-Harris) interactions with Inmate Pichardo, she assumed that she (Pichardo) was a female and it was not until Inmate Pichardo was assessed by Doctor Rodriguez that she questioned her (Pichardo's) gender. She described Doctor Rodriguez as being 5'2" - 5'4" tall, approximately 130 pounds and of a slim frame with grey hair. She also explained that the correctional setting was a new environment to him (Rodrguez).

Nurse Kamara-Harris denied Inmate Pichardo's gender being questioned when she was taken to see the practitioner. She stated, "It was not brought to my attention."

Nurse Kamara-Harris denied that she disposition Inmate Pichardo to be a male or that she had ever been asked to verify the gender; however, she recalled questioning an unknown female correctional officer as to why the blue tab reflected male gender if she was being held in the room with other female inmates. According to Nurse Kamara-Harris, the correctional officer looked at her in surprise and mumbled

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something but she could not understand what she had said.

Nurse Kamara-Harris stated that she was only present “initially” when Inmate Pichardo entered to see the practitioner to obtain her vital signs. She advised the practitioner that Inmate Pichardo did not speak English at which time the practitioner and Inmate Pichardo began to speak in what she believed to be Spanish. Nurse Kamara-Harris did not understand what was spoken about nor did the doctor tell her what the conversation consisted about.

When asked if she ever told anyone that while Inmate Pichardo was being assessed by the practitioner, a penis and testicles were discovered, Nurse Kamara-Harris stated there were no gender parts exposed. Nurse Kamara-Harris, stated, “Nothing. No gender was exposed. No parts were exposed. No breasts, no vagina, no penis because the individual was fully clothed in the attire that is given to the individual once they come through those doors.” She later defined the attire to mean the inmate uniform.

When asked if she had completed a Medical Health Addendum indicating that Inmate Pichardo was a male, a transsexual, a transvestite or had male genitalia and female characteristics, she replied, “Not that I recall.” When asked if the doctor had completed the form, she replied, “Not that I recall.” Nurse Kamara-Harris stated that if the doctor felt the

inmate needed to be looked upon to identify the gender, the doctor could have told her but it was never brought to her attention. She further stated, "Had it been brought to my attention, I would have had one of the nurses that was adjoined to the doctor's office and I would have taken that individual and had that individual stripped to the degree that we could identify what gender they were." On a second occasion, she stated that she did not recall providing correctional staff a Medical Health Addendum and explained that she would have signed the document.

When asked the purpose of someone being on HRT, she replied, "Uhm, hormone replacement therapy would would be uhm, I guess for individuals to start to develop uhm, breasts, uhm. It could be used to keep away facial hair, uhm." When asked to clarify, she replied, "Well, when I say to develop breasts, to keep, I'm assuming, to keep the breasts. I really don't know." After a pause, she stated, "Hormonal Replacement Therapy is for those who usually go through like menopause and they need to have hormonal replacement because it's depleted once you go through hormonal cycles." Upon being asked to clarify the statement she had made earlier regarding HRT being taken to develop breasts, she replied, "I, I take that back. I apologize for that." She then explained that it is used in pill form by females going through menopause, who need to have estrogen and progesterone replaced. She stated that to the

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best of her knowledge that would be the only use for HRT. She then acknowledged that HRT could also be taken by individuals who have undergone sex reassignment surgery.

Nurse Kamara-Harris was again asked if she had signed a Medical Health Addendum indicating that Inmate Pichardo was a male, a transsexual, a transvestite or had male genitalia and female characteristics, to which she replied, "Yes, I am denying it. I do not recall that." (See Official Record #13c- Witness Statement Form and #17- Sworn Recorded Statement)

40. Nurse Kamara-Harris' signature on the Witness Statement Form, dated March 21, 2014, was compared to the signature on the Health Services Incident Addendum, dated November 5, 2013, which reflects Inmate Pichardo was seen at 2:00 a.m. by Nurse Harris and associated with Incident Report #F13-011073A. Both signatures appear to be similar. (See Official Record #4c- Health Services Incident Addendum #13c and #4c- Health Services Incident Addendum)
41. On March 21, 2014, at approximately 1:00 a.m., Nurse Bobby Marshall provided Sergeant Aguilera a sworn recorded statement at TGK.

Nurse Marshall is a registered nurse employed by JMH. Since June of 2013, she has been assigned to TGK. She is responsible to conduct psychiatric evaluations.

Nurse Marshall recognized Inmate Pichardo's booking photograph. She explained that Inmate

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Pichardo had been escorted to the Screening Area by a female Correctional Officer Singletary to be evaluated upon returning from being assessed by the doctor in Unit #K4-6. She was advised that Inmate Pichardo needed to be evaluated due to a genital change. According to Nurse Marshall, the officer also provided her with the relocation form.

(Investigator's Note: An inquiry of the MDCR Employee Database did not reflect a female correctional officer by the last name of "Singletary.")

Upon reviewing the CHS Master Problem Form, which is completed for every inmate seen by CHS, Nurse Marshall translated the first entry on the form, dated November 5, 2013, to reflect, "male on hormone" and the medication. She denied making the entries and explained that it appears to be the physician's signature. She acknowledged that the entry also reflects "transgender." Nurse Marshall acknowledged entering and signing the second entry on the form, dated November 5, 2013. She explained that the entry "psych" refers to the performance of a mental status evaluation which she performed. The evaluation consists on identifying the mental state of mind at the time of the interview. The inmate is questioned regarding if they know where they are, date, time, suicidal thought or hallucinations, use of drugs and alcohol, if they are homeless and if they are victims of sexual abuse. Nurse Marshall stated that she communicated with Inmate

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Pichardo via a male officer but she did not recall the officer's name.

Upon reviewing the CHS Physical Assessment Form, dated November 5, 2013, at 2:00 a.m., Nurse Marshall explained that the form is completed by the doctor. She was unable to identify the doctor by the signature. Nurse Marshall explained that the term "deferred" located by the "Genital-Urinary System" normally means there has been a physical sex change.

Upon reviewing the CHS Health Services Incident Addendum Form, she stated it appeared to have been completed by Nurse Harris on November 5, 2013, at 2:00 a.m. She stated that page one (#1) of the form does not indicate Inmate Pichardo as "deferred; however, the back of the form on page two (#2) reflects an entry signed by Officer Randall, which reads, "transgender with male parts with female tendencies." Nurse Marshall explained such information would have been obtained from either a physician or nurse.

Upon reviewing the CHS Internal Referral Form, Nurse Marshall explained that Inmate Pichardo was being referred to medical for a medical condition and to her (Marshall) for a psychological evaluation.

Upon reviewing the CHS Progress Record Referral Form, Nurse Marshall acknowledged making the entry, dated November 5, 2013, at 5:45 a.m. and signing the entry. She translated

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the entry to reflecting what Inmate Pichardo to mean, “No, I have all my genitals I was born with.” Nurse Marshall noted her observations that Inmate Pichardo appeared to be depressed and cooperative. Nurse Marshall assessed Inmate Pichardo to be oriented and alert and that she was what she was and knew who she was. Nurse Marshall also noted that she (Pichardo) denied being suicidal, attempts of suicide, hallucinations, sexual or physical abuse. Nurse Marshall went on to say, that she wrote, “Inmate has features of a female but she’s a male and genitals parts as a man.” Nurse Marshall went on to say that her assessment reflected that Inmate Pichardo denied the use of alcohol or drugs and that she (Pichardo) identified medical problems to consist of hypertension and stomach problems. Nurse Marshall also noted Inmate Pichardo did not appear to be in any pain and denied being on any medication for psychological disorders. She (Marshall) also documented that Inmate Pichardo had told correctional staff that she was a female. Nurse Marshall explained that although Inmate Pichardo appeared to be a female she documented “genitals parts as a man” due to what the doctor had said. Nurse Marshall denied personally verifying Inmate Pichardo’s gender. As to why she crossed out the words “has the genitals” and replaced it with “per inmate,” Nurse Marshall then explained that Inmate Pichardo appeared to be confused and may have not understood the question. Nurse Marshall also acknowledged documenting

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on the form, "Inmate told corrections he was a female." She explained that in an additional entry she referred to Inmate Pichardo as "he" due to the prior medical team's evaluation.

Nurse Marshall acknowledged completing a CHS Mental Health/Medical Relocation Form, dated November 5, 2013, at 5:45 a.m., which reflected Inmate Pichardo could be placed in general population.

Nurse Marshall stated that she was advised that the doctor examined her and noted that Inmate Pichardo had male parts and was taking hormones that males take to become a female.

Nurse Marshall explained that HRT is used by females to replace a hormonal deficiency. She acknowledged that HRT could also be used by someone who had undergone a sex reassignment surgery.

Nurse Marshall stated that if an inmate informed her that they were on HRT, she would inquire further and perform an examination to verify the information and not automatically assume the individual was a transsexual.

In closing, Nurse Marshall stated that Inmate Pichardo appeared to be confused and not understanding what was going on. She later stated that Inmate Pichardo appeared to be relaxed but confused. (See Official Record #13d-Witness Statement and #17- Sworn Recorded Statement)

42. On March 26, 2014, a request was submitted to Corporal Deckram Croker, Badge #4851, of the Classification Unit for the original blue tab. On March 27, 2014, Corporal Croker notified me, Sergeant Aguilera via telephone that he was unable to locate the blue tab; however, he would continue to search for it. (See Case History)
43. On April 1, 2014, at approximately 10:24 a.m., Doctor Fredesvindo Rodriguez-Garcia provided SIAB Sergeant Aguilera a sworn recorded statement at TKG. Doctor Rodriguez-Garcia stated the following:

Doctor Rodriguez-Garcia has been a physician for approximately forty-four (44) years and had practiced in numerous other countries. He was employed by the State of Florida for four (4) years and assigned to the prison system. During the last nine (9) months he has been employed by JMH where he has been assigned to CHS.

Doctor Rodriguez-Garcia did not initially recognized Inmate Pichardo's booking photograph; however, he recognized her name. He recalled performing a physical evaluation of her (Pichardo), which consisted of medical history questions in Spanish, a visual check of the eyes, mouth and skin for sores and to listen to the lungs with a stethoscope. Doctor Rodriguez-Garcia acknowledged there was a nurse assigned to work with him that evening that came in and out of the office; however, during Inmate Pichardo's physical evaluation she was dispensing medication to other patients.

Doctor Rodriguez-Garcia stated that when he actually began to perform the physical evaluation he had reviewed the medical pre-screening documentation, which indicated HRT. According to Doctor Rodriguez-Garcia, HRT is prescribed to treat women diagnosed with menopause to replace progesterone and/or estrogen hormones. He also explained that HRT may also be used by transgender individuals. Doctor Rodriguez-Garcia stated that he did not know why but when he learned Inmate Pichardo was on HRT, he assumed that she was a transgender. He explained that based on the HRT and the assumption that she (Pichardo) was transgender; he asked her in a general sense if she had all "sex parts," which he meant genitals. Later during the interview, he also stated that he had asked Inmate Pichardo if she had any surgery to her genitals. Inmate Pichardo replied that she did have all her genitals and denied any surgery to her genitals. Doctor Rodriguez-Garcia denied specifically asking her (Pichardo) if she had male or female genitalia or if she was transgender. Doctor Rodriguez-Garcia also denied asking her (Pichardo) why she was on HRT and explained that it was a difficult question to ask. He later stated that he was wrong in assuming that Inmate Pichardo was transgender and acknowledged that he should have been more specific with the questions regarding her genitals.

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Doctor Rodriguez-Garcia explained that he did not check Inmate Pichardo's genitals; therefore, a nurse was not needed. He further explained that in cases where a visual check of the genitals is required, the patient is taken to the Clinic where a doctor, nurse and officer are present to perform the check. He acknowledged that he has conducted such visual checks to verify an individual's gender. However, he did not perform a visual check to verify Inmate Pichardo's gender. He also denied being advised by correctional staff or other medical staff that she (Pichardo) was transgender and again explained the visual check was not performed because he assumed she was transgender. Doctor Rodriguez-Garcia acknowledged his assumption was wrong.

Doctor Rodriguez-Garcia reviewed the CHS Physical Assessment form, dated November 5, 2013, at 2:00 a.m., which he acknowledged completing and signing. He explained the term "deferred," which he wrote following the Genital-Urinary System, meant that an assessment would be conducted at a later time.

Doctor Rodriguez-Garcia reviewed the CHS Physician's Order Sheet and acknowledged making the first entry, dated November 5, 2013, at 2:10 a.m. He translated the notes to mean the inmate could go to general population and that he prescribed ibuprofen due to her (Pichardo) complaint of pain and Zantac to protect the stomach. He also prescribed a low sodium diet due to high blood pressure.

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Doctor Rodriguez-Garcia reviewed the CHS Master Problem List form and acknowledged that after performing a physical evaluation of Inmate Pichardo he had made the first entry, dated November 5, 2013, which translated into, "male on hormonal treatment transgender."

Doctor Rodriguez-Garcia acknowledged that he had been disciplined by JMH in this matter. As part of the discipline, he attended additional training regarding transgender individuals.

In closing, Doctor Rodriguez-Garcia wished the record to reflect that he has been feeling bad about the assumption he made regarding Inmate Pichardo due to the HRT. He learned it is best to have the inmate taken to the Clinic to verify the gender. He is very concerned and very sad about the incident. He is sorry that she (Pichardo) was sent to a male's facility because of him. (See Official Record #13e- Witness Statement and Transcript, and #17- Sworn Recorded Statement)

44. An inquiry of the IAU Database did not reflect any prior similar reported incidents. (See Case History)

Conclusion

I am requesting that Case #GI-13-435, be closed as a Memo-To-File based upon the following:

1. Doctor Rodriguez-Garcia's acknowledged that he assumed Inmate Pichardo was transgender and he failed to conduct a visual check, which

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resulted in Inmate Pichardo's gender information being changed.

2. Based on the totality of the circumstances, there were no investigatory findings identified to indicate any departmental violation by MDCR staff.

This Memo-To-File is being submitted without prejudice. This case will be considered closed until additional information is obtained that would substantiate reopening it. "I, the undersigned, do hereby swear, under penalty of perjury, that, to the best of my personal knowledge, information, and belief, I have not knowingly or willfully deprived, or allowed another to deprive, the subject of the investigation of any of the rights contained in ss. 112.532 and 112.533, Florida Statutes."

/s/ Victoria M. Aguilera
Sergeant Victoria M. Aguilera
Badge #3479