ISRAEL BORNSTEIN, as ADMINISTRATOR OF THE ESTATE OF AMIT BORNSTEIN and ISRAEL BORNSTEIN, individually Plaintiffs, v. COUNTY OF MONMOUTH, MONMOUTH COUNTY SHERIFF'S OFFICE, MONMOUTH COUNTY CORRECTIONAL INSTITUTION, LT. THOMAS BOLLARO, SGT. KENNETH NOLAND, OFC. TRACEY TIFT, OFC. THOMAS RICCHIUTI, OFC. TIMOTHY HUDDY, OFC. DANIEL HANSSON, OFC. RAYMOND PAUL, OFC. RICK LOMBARDO, OFC. STEVEN YOUNG, OFC. GEORGE THEIS, OFC. DONALD BENNETT, OFC. CHRISTOPHER PINEY, OFC. BERNARD FISHER, OFC SARA M.STURT, OFC. JAMIELYN ROOSBACK, OFC. LEO HAFNER, OFC. DAVID MILLARD, JOHN DOES 1-10, and CORRECT CARE SOLUTIONS, LLC Defendants.	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY Case No. 3:11-CV-05336-PGS-DEA CIVIL ACTION **BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS**

Dated: July 9, 2014

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INTRODUCTION

Pending before the court is a motion to seal more than an hour of video footage of Amit Bornstein while in custody at the Monmouth County Correctional Institution ("MCCI"). Mr. Bornstein died during his four hours at MCCI, and his family has filed a suit alleging constitutional violations, including that the County Defendants engaged in excessive force.

Allegations of abuse and misconduct in New Jersey's prisons and jails are not uncommon. Yet, in the vast majority of reports, the public only has access to limited information about these claims given the lack of access that the government provides to these facilities. *Amicus* American Civil Liberties Union of New Jersey submits this brief to focus the Court's attention on the public's interest in having access to the video footage, an interest which, especially in the present context, far outweighs the vague assertions of risk put forth by the County Defendants. The ACLU-NJ further submits that visual evidence of misconduct is a unique and significant source of information, particularly in the prison context. Finally, other jurisdictions have released video of similar areas of their correctional facilities, recognizing that the exceptional public interest in understanding the nature of alleged government misconduct outweighs the negligible and illusory risk of harm.

INTERESTS OF *AMICUS*

The American Civil Liberties Union of New Jersey (ACLU-NJ), the state affiliate of the national American Civil Liberties Union, is a private, non-profit, non-partisan organization with tens of thousands of supporters throughout the state. The ACLU-NJ is dedicated to the principle of individual liberty embodied in the Constitution and committed to the defense and protection of civil rights and civil liberties. For more than fifty years, the ACLU-NJ has participated directly

and as *amicus* in a wide variety of cases involving the First Amendment, the due process rights of prisoners and pretrial detainees, and government transparency and accountability, each of which are presented in the pending Motion to Seal. It has appeared in numerous cases, including in federal courts. *See, e.g., Lima v. Newark Police Dep't*, 658 F.3d 324 (3d Cir. 2011) (challenge to police misconduct resulting in deprivation of free expression); *Fenton v. New Jersey Transit Corp.*, No. 10-cv-5761 (D.N.J. 2011) (right of employee to engage in free speech on day off); *C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612 (D.N.J. Apr. 22, 2010) (right of high school student to wear anti-abortion armband at school); *O.T. ex rel. Turton v. Frenchtown Elementary School Dist. Bd. of Educ.*, 465 F. Supp. 2d 369 (D.N.J. 2006) (right of elementary student to sing religious-themed song at after-school talent show).

The ACLU-NJ has an interest in the adjudication of issues affecting the right of New Jersey's citizenry to obtain meaningful and timely access to appropriate information concerning the workings of government. For more than twenty years, courts have granted the ACLU-NJ to appear as *amicus* in cases presenting these issues. *See, e.g., Tarus v. Borough of Pine Hill*, 189 N.J. 497, 506 (2007); *New Jerseyans for Death Penalty Moratorium v. N.J. Dep't of Corr.*, 185 N.J. 137, 143 (2005); *North Jersey Newspapers Co. v. Passaic County Bd. of Chosen Freeholders*, 127 N.J. 9, 19 (1992). More recently, the ACLU-NJ's Open Governance project has litigated and advocated exclusively for increased government transparency. *See, e.g., Am. Civil Liberties Union of New Jersey v. F.B.I.*, 733 F.3d 526 (3d Cir. 2013) (challenging denial of FOIA request seeking FBI ethnic mapping documents); *Am. Civil Liberties Union of New Jersey v. New Jersey Div. of Criminal Justice*, 435 N.J. Super. 533 (N.J. Super. Ct. App. Div. 2014) (finding that the state unlawfully redacted records); *Burnett v. Cnty. of Gloucester*, 415 N.J.

Super. 506 (N.J. Super. Ct. App. Div. 2010) (defining settlement agreements as public records under the Open Public Records Act).

The ACLU-NJ also advocates for, and has been involved in litigation, to ensure that the rights of prisoners, including pretrial detainees, are respected. *See, e.g., Colon v. Passaic Cnty.*, No. 08-4439 (D.N.J.) (in constitutional challenge to jail conditions, currently representing class of inmates during 5 year monitoring period of court-ordered settlement), *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 621 F.3d 296 (3d Cir. 2010) *aff'd*, 132 S. Ct. 1510 (U.S. 2012) (challenging the constitutionality of blanket strip search policies in jails); *Jones v. Hayman*, 418 N.J. Super 291 (N.J. Super. Ct. App. Div. 2010) (bringing equal protection challenge on behalf of women prisoners). The proper resolution of this case therefore is a matter of direct and substantial concern to the ACLU-NJ and its members.

PROCEDURAL HISTORY AND BACKGROUND

On July 29, 2010, Amit Bornstein was arrested and brought to the Monmouth County Correctional Institution ("MCCI" or the "jail"). Within four hours of his arrival at MCCI, he was dead. On September 9, 2011, his family and estate filed a civil rights action against the Defendants. (Dkt No. 1). During the course of the litigation, the Monmouth County Defendants filed a motion for summary judgment. (Dkt No. 66). On January 7, 2014, Plaintiffs filed a brief in opposition which included Exhibits H and I, two video recordings of jail surveillance footage. (Dkt No. 86). On May 12, 2014, the Monmouth County Defendants requested to temporarily seal Exhibits H and I, pending a formal motion subsequently filed on May 27, 2014. (Dkt Nos. 119, 121).

The Video Footage Subject to the Motion to Seal

Based on information in the publicly available record, the ACLU-NJ understands that the exhibits at issue in the Monmouth County Defendants' Motion to Seal contain video footage from the jail's booking area and constant watch area. (Dkt No. 86, Ex. E). Specifically, Plaintiffs' expert, Martin Horn, describes an approximately 90 minute period beginning approximately forty minutes after Mr. Bornstein arrived at the jail. *Id.* at 3. During the first ten minutes of footage, Mr. Horn describes Mr. Bornstein being shoved, pulled, pushed, slammed, and struck by correctional officers before he ended up on the floor with four or five officers piled on top of him. *Id.* at 3. Mr. Horn's complete report describes several uses of force by correctional officers on Mr. Bornstein after he was handcuffed and shackled, including additional "pile ons," the deployment of OC spray, and ultimately, the use of a restraint chair. *Id.* at 3-5.

The Sutton Certification

To support their Motion to Seal, the County Defendants rely upon the certification of Captain Donald Sutton who is "responsible for the supervision of institutional security policies" at MCCI. Cert. of Donald Sutton ¶ 1(Dkt No. 121-2). The certification confirms that the footage depicts the incidents in the jail's booking and constant watch areas. *Id.* ¶ 4. He describes the areas as "restricted access areas" to which "members of the general public… are not granted access" and that which "inmates … do not possess the ability to freely visit without correctional supervision." *Id.* at ¶5. Cpt. Sutton describes the video as depicting jail "protocol regarding the handling of a combative and disorderly inmate" including "uses of force and [officers'] response patterns." *Id.* at ¶6. He suggests that the these images are sensitive and that observations by the general public compromise MCCI's security. *Id.* at ¶¶ 7-9.

LEGAL ARGUMENT

The Defendants have not met their burden of demonstrating good cause for sealing the video from the public, and even if they had, the public's interest in access to the footage outweighs any speculative risks to the security of the jail. There is a presumption of access to court records which can only be overcome when the party seeking to seal the record demonstrates a serious and clearly defined injury that would result in the release. The County Defendants have not met that burden. Moreover, the public interest in transparency – not only in court records but in records that illuminate how a public entity functions – is paramount. Because Mr. Bornstein died while in custody of the County Defendants, the public has a right to understand how the facility is managed and to gauge both the risk of future injuries or deaths at MCCI and the potential costs of those risks, both human and financial.

I. THE PUBLIC INTEREST IN DISCLOSING THE VIDEO OUTWEIGHS THE DEFENDANTS' SPECULATIVE INTERESTS IN SEALING IT FROM PUBLIC VIEW.

The video footage in this action was filed as an exhibit in response to the County Defendants' motion for summary judgment. As such, it is presumptively available to the public. *Leucadia, v. Applied Extrusion Technologies*, 998 F.2d 157, 165 (3d Cir. 1993) (finding a presumptive right to public access to all material filed in connection with nondiscovery pretrial motions). The movant is responsible for establishing that it has a clearly defined and serious harm that is described with specificity. The County defendants have only offered vague speculation about potential harms and would not be able to overcome's the public interest in understanding the

A. The Public Has a First Amendment and Common Law Right to View Judicial Records Which Can Only Be Sealed Upon a Showing of Good Cause.

The public has both a First Amendment and common law right of access to judicial proceedings and records. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1066-70 (3d Cir. 1984). Concomitant with the right to access proceedings is the right of the public and the press to inspect and copy judicial records and documents from those proceedings. *Id.* at 1069. These rights are grounded in the value that "[p]ublic access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs." *Id.* at 1170; *see also Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978) (noting the "citizen's desire to keep a watchful eye on the workings of public agencies").

When filing a motion to seal pursuant to Local Civil Rule 5.3(c)(2), to overcome the public's presumed right of access to the court records, the movant is required to make a particularized showing of "good cause," i.e., that disclosure will cause "a clearly defined and serious injury to the party seeking closure." *Securimetrics, Inc. v. Iridian Techs*, No. 03-04394 2006 WL 827889 at *2 (D.N.J. Mar. 30, 2006). If the court finds good cause, then the court must balance the public interest in access against the designated party's private interest in confidentiality. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (finding that the good cause determination must balance the public's interest in the information against the injuries that disclosure would cause). "In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *In re Cendant Corp*., 260 F.3d 183, 194 (3d Cir. 2001) (citing *Publicker*, 733 F. 2d at 1071).

B. Ill-Defined, Speculative Harm Does Not Justify Blocking Access to Judicial Records.

As part of a "good cause" analysis, the movant is required to identify the "clearly defined and serious injury that would result" if the order is not granted. Here, the County Defendants have only put forth generalized risks with no specificity how the video footage would reveal currently confidential information.

Amicus does not dispute that the County Defendants have a legitimate interest in maintaining the institutional security and safety of MCCI. The Sutton certification, however, does not explain how the release of this particular footage presents anything but a generalized risk. The County Defendants fail to distinguish how viewing the footage would provide any additional security information that is not already publicly available on the Court's docket and filed by both parties in the litigation. *See, e.g.*, Dkt Nos. 66 and 86. Indeed, the general layout of the rooms the video depicts is alerady in full view of all inmates who have occasion to enter them.

In *Johnson v. Sullivan*, Chief Judge Simandle denied a request to seal an investigatory file containing incident reports because the defendant Department of Corrections failed to specify what information in the report was confidential or how its release would impact the prison's security. 2009 U.S. Dist. LEXIS 67398 at *7-9 (D.N.J. 2009). There, the DOC submitted a certification contending "in general terms" that the information at issue "could compromise the safety and security of the Department of Corrections and staff." *Id*. at 4. The court held that these "vague descriptions" regarding a potential compromise of safety and security fell short of the legal standards. Id. at *8. *Cf. Barkley v. Ricci*, 2007 U.S. Dist. LEXIS 92180 (D.N.J. 2007) (sealing document that detailed how often prison searches were conducted, the manner done, and the precautions taken).

As in *Johnson*, the County Defendants do not make any specific assertions as to how the release of the information would disclose previously unrevealed information that caused a specific risk. For example, the County Defendants do not put forth any evidence that the locations of the surveillance cameras are hidden and that it would create a hazard if the inmates learned that they were under surveillance from particular angles. *See Kounelis v. Scherrer*, 2005 U.S. Dist. LEXIS 20070, *30-33 (D.N.J. Sept. 5, 2005) (in case requiring prison officials to produce video to plaintiff, noting that prisoners know they are under scrutiny regardless of the location of the camera). The New Jersey Appellate Division has rejected general assertions of confidentiality by the Department of Correction when it failed to turn over video to a plaintiff prisoner. *Robles v. New Jersey Dep't of Corr*., 388 N.J. Super 516 (N.J. Super. Ct. App. Div. 2006). The *Robles* court noted that the DOC had failed to provide sufficient detail to indicate the particular risk in releasing the footage, including information regarding the number of cameras, whether they were concealed or visible, whether the cameras indicate whether they are filming, whether the cameras were stationary or could be aimed, and whether the cameras needed to be activated. 388 N.J. Super at 520-21. "If the Department believes that revealing some of this information would impair security, it should explain why. In short, *the prison must develop a record regarding the need for confidentiality of the particular videotape it relies upon and may not simply assert generally that its disclosure would threaten security*." *Id*. (emphasis supplied).

Similar to the record before the court in *Robles*, the County Defendants have not created a record that justifies sealing the footage. In fact, the Sutton certification suggests that many people have access to the areas revealed in the video. The County Defendants never suggest that members of the general public are always excluded from booking and constant watch. The "general public *when visiting inmates* at MCCI are not granted access to these areas." Cert. of

Donald Sutton ¶ 5. Such language suggests that there may be times that certain members of the public have access to these areas. [1] In addition, the certification confirms that MCCI inmates have access to those areas. Even if inmates may not "freely visit" booking and constant watch without "correctional supervision," *id.*, when in those areas, they have the ability to engage in the same kind of visual inspection of the areas that was captured in the Bornstein video footage.

Just as inmates have the ability to observe and inspect the areas of MCCI at issue, they are also able to observe correctional officer protocols and methods for responding to disturbances. Courts have found that incidents witnessed by inmates, including technique, weapons, and equipment used by officers "[do] not create the possibility of any serious safety considerations." *Buffalo Broadcasting Co. V. New York State Dep't of Corr. Services,* 174 A.D.2d 212, 213-14 (N.Y. App. Div. 1992) (affirming the release of prison footage under state's freedom of information law). In their motion, the County Defendants do not address how the video footage at issue captures anything beyond "completely conventional" protocols that are otherwise observable. *Id*. The Sutton certification suggests that the release of the footage "could potentially assist" in an assault or attempted jailbreak. Yet there is nothing in the record to indicate that the video contains information that would not otherwise be plainly visible to the inmates who are regularly in the booking room or constant watch. The video might, of course, present evidence of officers *violating* protocol and violating the rights of Mr. Bornstein. That video might disclose misconduct is not a valid reason to maintain its confidentiality, however. Indeed, keeping misconduct from public view is far afield from security concerns. Like the court in *Buffalo Broadcasting*, this Court should find these speculative contentions "conclusory and unsupported." *Id*. at 216.

[1] Indeed, Intervenor CBS Broadcasting point to images of the area that are available on line. Intervenor's Brief, Dkt No. 127, at 10-11.

C. The Public Interest Is Served By Releasing the Video Because of the Strong Interest in Understanding Alleged Government Abuse.

Even if the County Defendants had put forth non-speculative and clearly defined reasons to overcome the presumption of public access to the video footage at issue, the Court would then be required to balance the Defendant's showing against the public's interest in the material. *Pansy*, 23 F.3d at 788. Here, the public has an overriding interest in learning about whether the alleged civil rights violations occurred and what information law enforcement authorities used to determine that neither criminal nor disciplinary sanctions were required.

In addition to the public's interest in access to judicial proceedings, in this case there is a strong public interest in understanding the circumstances of a death that occurred while in government detention. The Plaintiffs allege that the County Defendants are liable for constitutional violations, including excessive force and brutality that resulted in death. (Dkt No. 86.) As citizens, residents, and taxpayers, members of the public have an interest in understanding the claims and holding accountable those institutions and individuals for the tasks they undertake on our behalf. *Pansy*, 23 F.3d at 788 (when balancing the public interest against the proffered reasons for sealing court records, a court considers whether the "party benefitting from the order of confidentiality is a public entity or official"). The County Defendants accepted Mr. Bornstein in to their custody and, upon his death, the treatment and care they provided to him becomes of paramount importance as it relates to matters of public interest including how the facility is managed, the extent to which policies and procedures were followed, and the risk of future injuries or death and the potential costs of those risks, both human and financial.

The New Jersey Supreme Court has recognized that there is "a profound public interest" in cases involving health and safety, and that this "heightened interest requires that trial courts be more circumspect when deciding whether to seal or unseal records used in litigation." *Hammock*

by Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356, 379 (1995). In *Hammock*, intervenors sought public filings related to the risks of a pharmaceutical drug in a products liability action so that they could better advocate for regulation of the drug. Though this case presents a different context, there is an equally strong public interest here because the underlying health and safety issues to be examined occur in a public institution that is in the exclusive control of the government. The video can inform the public, including advocacy organizations such as the ACLU-NJ, whether there is a need for better training, revised operating procedures, or updated regulations and statutes to help ensure that a similar incident does not occur in the future.

The County Defendants apparently do not dispute the contention that there will be great public interest in the video. By suggesting that its jury pool could be improperly influenced by the release of the video footage, they implicitly recognize that the information within the video is newsworthy and a matter of general public concern.[2]

The images contained in the video footage are a critical way for the public to understand the events of July 29, 2002. Video and photographic imagery are often instrumental to understanding governmental activities. As Justice Brennan acknowledged thirty years ago, visual images convey information that words alone are unable to capture. *See Reagan v. Time, Inc.*, 468 U.S. 641, 678 (1984) (Brennan, J., concurring in part and dissenting in part) ("The adage that 'one picture is worth a thousand words' reflects the common-sense understanding that

[2] Obviously, having not seen the video, amicus takes no position whether the video risks influencing the jury pool. Nevertheless, withholding the footage from the public is a grossly disproportionate response. Adverse pretrial publicity is not uncommon and district courts have several mechanisms for managing jury selection. The District Court is required to consider "whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity." *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 100 (3d Cir. 1988) (quoting *Nebraska Free Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1975) (noting that to remedy pretrial prejudice the district court could have considered change of venue, postponement of the trial, careful voir dire, or emphatic jury instructions).

illustrations are an extremely important form of expression for which there is no genuine substitute.").

The significance of the information that a video recording conveys is illustrated by *Scott v. Harris*. 550 U.S. 372 (2007). In *Scott*, the United States Supreme Court embraced the use of a dashboard video recording of a suspect fleeing from a police officer when reviewing whether summary judgment should have been granted in a claim for excessive force. *Id.* at 378-79. The Court is clear that the existence of the video affected its approach to the case, referring to the plaintiff's case as a "visible fiction." *Id.* at 381. "Because watching the video footage of the car chase made a difference to my own view of the case," Justice Breyer suggested that readers view it for themselves. *Id.* at 387 (Breyer, J., concurring) (citing to 550 U.S. 378 n.5).[3] The Court was able to conclude that the officer's actions were not excessive force as a matter of law solely because the recording was a complete and unedited recording as the events unfolded. *Id.* at 378 (noting that there were no allegations that the video had been altered "nor any contention that what it depicts differs from what actually happened").

The Supreme Court's decision in *Brown v. Plata* likewise demonstrates the impact of visual images in the context of prison conditions. 131 S.Ct. 1910 (2011). In *Brown*, the Supreme Court reviewed a class action prison conditions case and affirmed the decision of an appellate tribunal that ordered California to reduce its prison population to remedy systemic Eighth Amendment violations. 131 S.Ct. at 1923. Justice Kennedy concluded the majority opinion with three black and white photographs, two depicting prison overcrowding and one of "dry cages/holding cells" for people awaiting mental health treatment. *Id.* at 1949-50. The photographs give meaning to the Court's narrative. It is one thing to read how California's prisons were operating at 200% capacity for more than a decade, *id.* at 1923-24; it is quite

[3] The *Scott* video is now available at http://www.supremecourt.gov/media/media.aspx (last accessed July 1, 1014).

another to view what it looks like when "[p]risoners are crammed into spaces neither designed nor intended to house inmates." *Id.* When Justice Kennedy describes how "suicidal inmates may be held for prolonged periods in telephone-booth sized cages without toilets," *id.* at 1933, the reality of what that may feel like is conveyed in the photograph. *Id.* at 1950. *See also Bono v. Saxbe*, 527 F. Supp. 1187, 1197-98 (S.D. IL. 1981) (appending photographs of "boxcar" prison cells at U.S. Penitentiary at Marion); *Rhem v. Malcolm*, 432 F. Supp. 769, 790 (S.D.N.Y. 1977) (photograph of the cell structure on the ninth floor of the Manhattan House of Detention).

For more than thirty years, jails and prisons have used video cameras to document interactions between correctional officers and prisoners, resulting in a decrease in inmate complaints. Noam S. Cohen, *Videotape in Prison: 3d Voice in 2-Sided Stories*, N.Y. Times, Aug. 17, 1991, § 1, at 1. Because of the important role they play in resolving disputes over reports of brutality, they have been welcomed by both correctional officers' unions and prisoner advocates. *Id*.

In the corrections context, visual materials become essential sources of information for the public because allegations of government misconduct often result in a credibility assessment between a plaintiff prisoner and defendant correctional officers. "And it only makes sense that inmates… most often lose swearing contests; both judges and juries tend to find convicted criminals unappealing and unbelievable witnesses." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev 1555, 1615; *Kounelis v. Scherrer*, 2005 U.S. Dist. LEXIS 20070 at *30 (prison surveillance video is the only "objective witness to the altercation").

It is not only judges and juries that do not credit the statements of inmates. In 1997, after a correctional officer was killed by an inmate acting alone at New Jersey's Bayside State Prison, the prison went into lockdown for a month resulting in hundreds of allegations of widespread

abuse and retaliation against inmates by correctional officers. John Sullivan, *Claims of Widespread Beatings Persist in a 1997 Prison Episode*, N.Y. Times, Apr. 21, 2003, §B5. The Department of Corrections' Internal Affairs conducted hundreds of interviews regarding reports of abuse and administered polygraph tests that inmates passed, but did not substantiate complaints of the rampant misconduct. *Id*. More than 600 inmates filed suit and it was only as a result of that litigation that evidence supporting the allegations became known to the public six years later. *Id*. As a result of discovery, plaintiffs' lawyers made videos and other evidence available to the New York Times, which published a series of articles. *See id*.; John John, *New Jersey Set To Investigate Inmates' Claims Of Brutality*, N.Y. Times, Apr. 26, 2003 (reporting that the New Jersey Attorney General was opening a civil and criminal investigation into allegations of guard brutality); John Sullivan, *Gap in Surveillance Tape at Issue in Abuse Suit by New Jersey Inmates*, June 23, 2003 (reporting that a missing segment of surveillance video during which an inmate was injured raises the possibility that someone may have tried to hide evidence). The video evidence from the lockdown and its availability to the press was crucial in educating the public about allegations of misconduct and in forcing the government to open new investigations in to those allegations.

The video of Mr. Bornstein's last hours will give the public a more complex understandings of the events that took place in a way that deposition testimony and expert narratives cannot. The public is entitled to maximum information so that it may assess the propriety of actions taken by its government. The video footage is all the more important because Mr. Bornstein cannot provide his version of events.

II. VIDEOS OF SECURED AREAS IN PRISONS AND JAILS HAVE BEEN RELEASED WHEN CORRECTIONAL OFFICER MISCONDUCT IS ALLEGED.

In jurisdictions around the country, jail surveillance videos have been released when allegations regarding misconduct are alleged. Last month, U.S. District Judge John Kane in the District of Colorado ordered the release of video surveillance footage of secured areas of the Denver County Jail as well as police internal affairs reports regarding a jail pod that was reportedly "out of control." Kirk Mitchell, *Despite Denver Objections, Federal Judge Unseals Documents in Jail Abuse Case*, The Denver Post, June 12, 2014, *available at* http://www.denverpost.com/news/ci_25950783/denver-responds-witness-intimidation-allegations-jail-abuse-case); *see also Hunter v. City of Denver*, Dkt No. 12-CV-02682 (D. Colo.). In that case, the plaintiff made claims of a brutal beating and scalding by other inmates at the behest of a deputy. Like the video at issue in this matter, one of the released videos shows a secure area of the facility. At first, an inmate is talking to an officer and is followed by the officer taking the noncombative inmate into a cell and grabbing him by the neck. Another officer arrives and fires a stun gun. Mitchell, Kirk, *New Video Shows Denver Jail Deputy Choking Non-Combative Inmate*, The Denver Post, June 12, 2014, *available at* http://www.denverpost.com/news/ci_25958592/new-video-shows-denver-jail-deputy-choking-non. The city sought to keep the materials confidential, citing security concerns. The District Court properly rejected these arguments, releasing video and investigation reports.

In 2013, a federal judge in the District of Oklahoma allowed the pretrial release of a video of Elliot Earl Williams, an inmate with mental health concerns who died in the Tulsa Jail in 2011. Cox Media Group, *Tulsa Judge Releases Video of Inmate's Death at Tulsa Jail*, July 2, 2013, *available at* http://www.fox23.com/news/news/breaking-news/tulsa-judge-releases-video-of-inmates-death-at-tul/ndmwf/; *see also* Kevin Canfield, *Little Care Given Inmate Who Died,*

Jail Video Shows, The Tulsa World, July 2, 2013 *available at* http://www.tulsaworld.com/news/government/tulsa-jail-video-shows-little-care-given-to-inmate-who/article_7fa2ba58-9bf8-5b60-9e3b-99713e08e258.html. The video reportedly shows Mr. Williams, housed in a secure area of the facility, over the course of a 51 hour period during which he died of dehydration.

Also last month, the Texas Attorney General ordered the release of El Paso Jail surveillance video footage of an incident in which a city police officer shot and killed a handcuffed prisoner after a grand jury declined to indict the officer. While this release was the result of a public records request, it clearly demonstrates that the public has an interest in understanding the events leading up to the death of a person in custody. Borunda, Daniel, *City Releases Video of Fatal Police Shooting of El Paso Bodybuilder Daniel Saenz*, June 16, 2014, El Paso (TX) Times *available at* http://www.elpasotimes.com/news/ci_25977240.

Likewise, in cases that have had public hearings, videos of the alleged abuse are made available to the public. *See, e.g.*, Thomasi McDonald*available at, Wake Prosecutor Plays Graphic Video of Fatal Beating During Officer's Trial*, The News & Observer (Raleigh, N.C.), Dec. 10, 2013, *available at* http://www.newsobserver.com/2013/12/10/3450233/wake-prosecutor-plays-video-of.html (video available online); Phillips, Steve, *Video Of Williams' Jail Beating Released To The Public*, WLOX (Biloxi, MS), *available at* http://www.wlox.com/story/6995299/video-of-williams-jail-beating-released-to-the-public.

In each of the examples cited above, a detainee or his family alleges that misconduct – usually excessive force – resulted in significant harm or death. As recognized by the courts, the public has an overwhelming interest in understanding as much as possible about these types of incidents so that it can hold its government accountable for its conduct, and the government's

generalized, vague concerns regarding security does not trump that interest. Likewise, in the present case, the public interest in viewing these crucial videos is overwhelming and does not pose a risk to the ongoing safety and security of MCCI. Clearly, based on the existing submissions, the high burden on the County Defendants to overcome the presumption of openness has not been met.

CONCLUSION

For the foregoing reasons, *Amicus* ACLU-NJ respectfully requests that the Court deny the Motion to Seal and lift the temporary sealing order for Exhibits H and I of Plaintiff's Opposition to the Monmouth County Defendants' Motion for Summary Judgment so that the public may examine the video.

Dated: July 9, 2014

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