STRATEGIES in Brief

ÆQUITAS

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# Routine Strip-Searches Upheld for Intake into Jail's General Population

*Teresa M. Garvey, JD*[1]

On April 2, 2012, a majority of the United States Supreme Court, in a five-to-four decision, held that correctional institutions may conduct routine strip-searches[2] of all detainees, even those arrested for the most minor offenses, when such detainees are being admitted to the general population of the institution. In *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012), the Court held that such searches do not violate the Fourth Amendment. The Court based its decision upon precedents that required courts to defer to the expertise of corrections officials in deciding how best to ensure the security of their institutions and the safety of officers and inmates, even when those practices impinge on significant privacy interests of detainees. As two of the justices emphasized in their concurring opinions, however, the Court's decision did not address the question of whether such searches would be constitutionally justifiable without reasonable suspicion if the detainee were not to be admitted to general population, leaving open the possibility of limitations on such searches where alternatives to placement in the general population exist.

## THE LEGAL BACKDROP

More than thirty years ago, in *Bell v. Wolfish*, the Supreme Court held that pretrial detainees committed for minor offenses could be routinely strip-searched (including visual inspection of body cavities) following any contact visits, even in the absence of reason to believe they were carrying contraband.[3] Over the ensuing years, however, a majority of the federal courts had drawn a distinction between such searches conducted following a contact visit (which is usually a planned event) and those conducted upon admission to a facility immediately after arrest (which is generally unplanned and unexpected). Those courts reasoned that because arrestees usually did not know they were about to be arrested and confined, there was less risk such individuals would be able to smuggle contraband. These decisions prohibited strip-searches of persons newly arrested for minor offenses unless there was reason to suspect they possessed contraband.[4]

In recent years, however, two of the circuits that previously had drawn this distinction reversed their stance on the issue, concluding that a uniform policy for strip-search upon admittance to the general population of a jail, even in the case of those arrested for minor offenses, was permissible under the Fourth Amendment as interpreted by the Supreme Court in *Bell*.[5] With the *Florence* case, the Third Circuit became the third in the nation to oppose the majority view that banned such searches in the absence of reasonable suspicion.

## FACTS OF THE *FLORENCE* CASE

Albert Florence had been arrested in 1998 in Essex County, New Jersey, and charged with obstruction of justice, possession of a weapon, and related offenses arising from an incident in which he fled from the police in a motor vehicle. He later entered guilty pleas to two lesser offenses and received a fine. In 2003, he fell behind on his payments and a bench warrant was issued after he failed to appear for an enforcement hearing. He paid the fine in full shortly thereafter, but the warrant was, inexplicably, never removed from the state's computer system. In 2005, Florence was a passenger in his car, which his wife was driving, when a state trooper stopped them in Burlington County, New Jersey. The trooper placed Florence under arrest when a computer database check revealed the outstanding warrant. Because he was arrested in Burlington County, Florence was transported to that county jail pending transfer to Essex County, where the warrant had been issued.

At the Burlington County jail, Florence was required to remove his clothing so he could be visually checked for tattoos or other marks, any signs of injury or disease, and any contraband. Florence contended he was instructed to lift his genitals so that area could be inspected, a claim that the Burlington County defendants disputed. Officers also observed him as he showered and applied a de-lousing agent.

Six days later, Essex County authorities transported him to their jail, where he was again ordered to disrobe, to lift his genitals and, this time, to spread his buttocks for visual inspection. He alleged he was also instructed to turn away from the officers, squat, and cough. Officers observed him during his de-lousing shower. At his court hearing the next day, the court dismissed the warrant and ordered his release.

## DECISIONS OF THE DISTRICT OF NEW JERSEY AND THIRD CIRCUIT

Florence filed a civil rights suit against both counties and several officials under 18 U.S.C. §1983, alleging a violation of his Fourth Amendment right against unreasonable searches because he was subjected to a strip-search without reasonable suspicion that he possessed contraband. The lawsuit was certified as a class action, with the plaintiff class defined as detainees arrested for non-indictable offenses, who were processed, housed or held over at the Burlington or Essex County correctional facilities, and who were directed to strip naked for visual inspection by corrections officers as part of the intake process, without the articulation of a reasonable belief that the detainee was carrying contraband.

The District Court of New Jersey granted the plaintiffs' motion for summary judgment, agreeing that that they were deprived of their rights under the Fourth Amendment by being subjected to suspicionless strip-searches upon their admission to the jails.[6] On appeal, a divided panel of the Third Circuit reversed, adopting the reasoning of the minority of circuits that permitted such searches based upon the Supreme Court's decision in *Bell*, and upholding the search policies of the jails as constitutional.[7] The U.S. Supreme Court granted certiorari on the plaintiffs' petition for review of the Third Circuit's decision.

## SUPREME COURT DECISION

The Supreme Court's decision, authored by Justice Kennedy, and joined by Chief Justice Roberts and Justices Scalia, Alito, and Thomas (Justice Thomas joining only Parts I-III of the opinion), held that courts should defer to the decisions of corrections authorities with regard to security practices, "unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security."[8] Quoting from its 1984 decision in *Block v. Rutherford*, the Court said that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters."[9] Because the plaintiffs failed to make such a showing in the *Florence* case, the Court upheld the county jails' policies of conducting routine strip-searches of detainees arrested for minor offenses.

The Court observed that corrections officials face serious obstacles in maintaining institutional safety and security in view of the constantly changing inmate population and the various potential threats to the safety and well being of inmates and staff at the institutions. Starting with its prior decision in *Bell*, the Court reviewed the cases that had recognized the need to defer to the expertise of corrections officials to devise the best ways to combat security problems. Routine search policies are not "unnecessary" merely because instances of contraband smuggling at a particular facility are rare or nonexistent, the Court reasoned, because such policies should deter, as well as detect, such smuggling. The effectiveness of such deterrence largely depends, the Court noted, upon the nonexistence of predictable exceptions to search practices, which could be taken advantage of by those seeking to smuggle contraband into the institution. "Inmates would adapt to any pattern or loopholes they discovered in the search protocol and then undermine the security of the institution."[10]

The Court observed that the constitutionality of custodial arrest for persons charged with minor offenses had already been settled. In *Atwater v. Lago Vista*,[11] the Court had held that custodial arrests were permitted under the Fourth Amendment, even for minor offenses, where there was probable cause to believe that the suspect had committed an offense in the presence of the arresting officer. There was, therefore, no legal impediment to Florence's custodial arrest (which was based on a warrant). The question presented was whether, having been properly arrested, he could be subject to a visual strip-search[12] without a determination of reasonable suspicion to believe he was carrying contraband on his person.

The Court noted that the visual inspection of the unclothed bodies of detainees advanced several legitimate penological interests—legitimate concerns of jails and prisons. "The admission of inmates creates numerous risks for facility staff, for the existing detainee population, and for a new detainee himself or herself."[13] First is the concern that arriving inmates may be infested with lice or other parasites, infected with communicable diseases such as MRSA,[14] or suffering from wounds or

injuries visible only when clothing is removed. Detecting health problems at the time of admission prevents the spread of disease or infestation among the inmate population and ensures prompt treatment of health problems. Second, gang rivalries present a serious security problem at correctional institutions. Strip-searches may reveal tattoos or other signs of gang affiliation that will allow jail officials to segregate rival gang members within the institution. Third, institutional security depends upon preventing inmates from smuggling contraband by concealing it on, or in, their bodies. Weapons and drugs are not the only concern; the Court noted that other everyday items such as cash, cigarettes, or cell phones disrupt the security of the institution by encouraging bartering, theft, fights, and continued criminal activity behind bars.[15]

Rejecting the argument that persons arrested for minor offenses posed less of a threat than those arrested for serious offenses, the Court cited several highly dangerous individuals who were stopped by police for petty offenses shortly before or after their heinous crimes, including Oklahoma City bomber Timothy McVeigh, serial killer Joel Rifkin, and one of the 9/11 hijackers. The Court observed that even those detainees not inclined to smuggle for their own purposes might be vulnerable to coercion by others to conceal contraband for them. The Court further noted that corrections officers conducting intake procedures (particularly in jails) often have limited information about the background of new detainees, making it difficult or impossible to determine which individuals might pose a security threat. There was, the Court concluded, no reasonable way for corrections officers to reliably predict which new detainees might pose a serious threat to institutional security such that less intrusive searches could reasonably be required for certain classes of detainees. The need for institutional security and the concomitant need for easily administered intake procedures were sufficient reasons, the Court found, to justify the blanket strip-search policies challenged by the plaintiffs in this case.

Part IV of the opinion, which did not command a majority of the justices (Justice Thomas declined to join this part of the opinion) noted that the case addressed only the circumstance where detainees charged with minor offenses were to be placed in general population, explicitly leaving open the possibility that strip-searches of such detainees might not be justified where they instead are placed in a temporary holding area, separate from other detainees or inmates, pending appearance before a magistrate or expected to be released with or without bail within a short period of time. This portion of the opinion also stressed that the case did not present the issue of more invasive searches involving touching of the detainee's body by corrections officers, nor did it address the issue of abusive or gratuitously humiliating search procedures. Two of the Justices in the majority, Chief Justice Roberts and Justice Alito, wrote separate concurrences to emphasize these limitations on the Court's holding, with Justice Alito explicitly questioning whether such searches would be permissible if there were a way to hold minor detainees in a separate, secure location pending review of their detention by a magistrate.

## DISSENTING OPINION

Four justices dissented from the Court's opinion. The dissent, written by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, found the blanket strip-search policy for detainees charged with minor offenses to be an exaggerated response to the security issues presented by their placement in the general population of the jail. The dissent declared a strip-search involving close inspection of the detainee's naked body, with visual inspection of body cavities, to be "a serious invasion of that person's privacy."[16] Quoting an Eleventh Circuit opinion, the dissent characterized such searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission."[17] Although the dissenting Justices agreed that institutional security is a critical issue, they were not persuaded that the kind of strip-searches presented here were at all necessary to achieve that objective.

With respect to the concerns about injury or disease, or the need to recognize signs of gang affiliation, the dissent contended that viewing the detainees at a distance, as they showered or changed clothing, should be sufficient to enable officers to make any necessary observations.[18] As to the issue of contraband smuggling, the dissenting justices found no persuasive evidence that less-intrusive search methods would not suffice to detect and deter smuggling in the rare circumstances where a person charged with a minor offense might attempt to bring items into the jail. The dissent noted that a number of states already require reasonable suspicion or probable cause to strip-search persons detained for minor offenses, with no apparent increase in smuggling incidents. In short, the dissent found the practice of routinely strip-searching persons detained for minor offenses to be an exaggerated response to the security problems presented, and, therefore, to be unconstitutional. In the view of the dissenting justices, such searches would have to be based upon reasonable suspicion to be permissible under the Fourth Amendment.

## WHAT THE FUTURE HOLDS

Although the Supreme Court has upheld routine, visual strip-searches for detainees arrested for minor offenses when those persons are placed in the general population of a jail, it appears that a solid majority of the Court would come to a different conclusion if such detainees do not need to enter the general population or to be held with more serious offenders prior to arraignment. Undoubtedly, many jurisdictions may not have a practical means of segregating in this manner those charged with minor offenses. However, those institutions that do have such capability may need to adjust their intake practices to limit strip-searches of such detainees to cases where there is reasonable suspicion the detainee may be secreting contraband, for those searches to be justified under future refinements of the *Bell* and *Florence* decisions.

As the dissenting justices noted in *Florence*, intrusive strip-searches can be extremely distressing for those who must undergo such procedures. This is particularly true for detainees who may have been victims of sexual intrusion in the past. Nothing in the Supreme Court's decisions, however, prevents counties, states, or individual institutions from adopting stricter limitations on the use of strip-searches than the *Florence* decision requires. Since the Supreme Court has repeatedly expressed an unwillingness to weigh in on administrative procedures designed to promote institutional security, the most promising avenue for change in this area would appear to be advocacy for legislative and regulatory changes that would require reasonable suspicion before strip-searching persons charged with minor offenses, segregation of detainees charged with minor offenses at least until arraignment, or use of alternative search techniques, such as the Body Orifice Scanning System, wherever practicable. In addition, the *Florence* case highlights the need for clear legislative or regulatory guidance setting forth what constitutes a permissible strip-search under particular circumstances. The lower-court opinions, in particular, indicated considerable confusion among the corrections personnel charged with administering intake procedures about what constitutes a "strip-search" and the requirements and procedures for conducting such searches. Reforms in these areas may bring about practical, workable practices that will satisfy the need for institutional security crucial to the safety of all inmates, while minimizing the need to conduct searches that may traumatize detainees.

## ENDNOTES

[1] Teresa M. Garvey is an Attorney Advisor at AEquitas: The Prosecutors' Resource on Violence Against Women.

[2] The term "strip-search" was the subject of some debate in this case, with the correctional institutions that were defendants in this case reserving that term for a more invasive examination than the simple observation of the detainee's unclothed body by an officer. Furthermore, Florence's description of the searches to which he was subjected was at odds with the description of the searches the institutions claimed to have conducted. For purposes of its decision, the Court assumed as true Florence's claim that he was required to lift his genitals during the searches and, in one instance, to turn around, squat, and cough to dislodge anything that might have been concealed in his rectum. For convenience, this article will use the term "strip-search" to include a search in which the detainee is required to remove his or her clothing and to present all parts of the body, including body cavities, for close visual inspection.

[3] Bell v. Wolfish, 441 U.S. 520 (1979).

[4] *See*, *e.g.,* Shain v. Ellison, 273 F.3d 56, 64 (2nd Cir. 2001); Roberts v. Rhode Island, 239 F.3d 107, 111 (1st Cir. 2001).

[5] *See* Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008) (en banc) (overruling Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001)); Bull v. San Francisco, 595 F.3d 964 (9th Cir. 2010) (en banc) (overruling Giles v. Ackerman, 746 F.2d 614 (9th Cir. 1984)).

[6] Florence v. Bd. of Chosen Freeholders, 595 F.Supp.2d 492 (D.N.J. 2009), *rev'd*, 621 F.3d 296 (3d Cir. 2011), *aff'd*, 132 S.Ct. 1510 (2012).

[7] Florence v. Bd. of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2011), *aff'd*, 132 S.Ct. 1510 (2012).

[8] *Florence*, 132 S. Ct. at 1514.

[9] *Id.* at 1512 (internal quotation marks omitted, quoting Block v. Rutherford, 468 U.S. 568, 584-585 (1984)).

[10] *Id.* at 1517.

[11] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[12] The Court noted that the strip-searches at issue involved no touching of the inmates.

[13] *Florence*, 132 S. Ct. at 1518.

[14] Methicillin–resistant *Staphylococcus aureus,* a highly contagious and drug-resistant bacterial infection.

[15] It should be noted that smuggled cell phones have enabled inmates to engage in a wide variety of continued criminal activity, including intimidation, harassment, and stalking of victims and witnesses. *See* T. W. Burke and S. S. Owen, *Cell Phones as Prison Contraband*, FBI LAW ENFORCEMENT BULLETIN (July 2010), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/july-2010/cell-phones-as-prison-contraband; C. Toborg, *State Prison Officials Work To End Inmate Facebook Usage*, CENTRAL COAST NEWS (August 8, 2011), *available at* http://www.kionrightnow.com/story/15232752/state-prison-officials-work-to-end-inmate-facebook-usage.

[16] *Florence*, 132 S. Ct. at 1525 (Breyer, J., dissenting).

[17] *Id.* at 1526 (Breyer, J., dissenting) (quoting Mary Beth G. v. Chicago, 723 F.2d 1263, 1272 (7th Cir. 1984)) (alteration and omission of internal quotation marks in original).

[18] The plaintiffs had conceded that corrections officers had the right to observe detainees while they showered.


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1100 H Street NW, Suite 310 • Washington, DC 20005
P: 202-558-0040 • F: 202-393-1918