

NO. 09-3603 & NO. 09-3661
CONSOLIDATED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALBERT W. FLORENCE
Plaintiff-Appellee

v.

BOARD OF CHOSEN FREEHOLDERS OF THE COUNTY OF BURLINGTON;
BURLINGTON COUNTY JAIL; WARDEN JUEL COLE, Individually and
officially as Warden of Burlington County Jail; ESSEX COUNTY
CORRECTIONAL FACILITY; ESSEX COUNTY SHERIFF'S DEPARTMENT;
STATE TROOPER JOHN DOE, Individually and in his capacity as a State
Trooper; JOHN DOES 1-3 of Burlington County Jail & Essex County Correctional
Facility who performed the strip searches; JOHN DOES 4-5
Defendant-Appellants

ON APPEAL FROM THE DISTRICT OF NEW JERSEY
CIVIL NO. 1-05-cv-3619 (JHR)

**BRIEF ON BEHALF OF AMICUS CURIAE PENNSYLVANIA PRISON
SOCIETY IN SUPPORT OF PLAINTIFF-APPELLEE ALBERT W.
FLORENCE**

JENNIFER R. CLARKE
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
1709 Benjamin Franklin Parkway,
Second Floor
Philadelphia, PA 19103
(215) 627-7100
E-mail: jclarke@pilcop.org

DAVID RUDOVSKY
KAIRYS, RUDOVSKY, MESSING
& FEINBERG LLP
718 Arch Street, Suite 501 South
Philadelphia, PA 19106
(215) 925-4400
E-mail: drudovsky@krphila.com

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Pennsylvania Prison Society was founded in 1787 as the Philadelphia Society for Alleviating the Miseries of Public Prisons. It traces its origins to the confluence of colonial revolutionary commitment to liberty and Quaker loathing of violence. Its mission is to advocate for a humane, just and restorative correctional system, and to promote a rational approach to criminal justice issues. It does not excuse the crimes committed by the people it serves, but rather strives for a society where all people are held accountable with appropriate and restorative punishment. Above all, it believes the humanity in all our citizens must be recognized.

The Prison Society has a unique access to and understanding of conditions within Pennsylvania correctional facilities: an 1829 Act of the Pennsylvania legislature provided the Prison Society's Official Visitors access to all state and county correctional facilities. This legislative mandate, unmatched anywhere in the nation, ensures citizen involvement in the administration of justice which provides a base of information for the oversight of the prison system and for inmate advocacy. The Prison Society's network of more than 450 Official Visitors makes roughly 5,000 prison visits each year and continues to be one of the most vital and important aspects of the organization.

INTRODUCTION

Consistent with its mission to promote a rational approach to criminal justice issues, the Prison Society urges this Court to affirm the district court's holding that the blanket strip search policies of the Burlington County Jail and Essex County Correctional Facility—in which all non-indictable arrestees are subject to a strip search without an articulation of reasonable suspicion—violate the Fourth and Fourteenth Amendments of the United States Constitution.

This law is clearly established in the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits that such strip search policies are violations of the Fourth and Fourteenth Amendments or that an official is not entitled to qualified immunity because the right to be free from such blanket strip searches was clearly established. **First Circuit:** *Roberts v. State*, 239 F.3d 107 (1st Cir. 2001); *Swain v. Spinney*, 117 F.3d 1 (1st Cir. 1997); *Eliot v. Strafford County*, No. 98-637, 2001 U.S. Dist. Lexis 1246 (D.N.H. Feb. 7, 2001); *Ford v. Suffolk County*, 154 F. Supp. 2d 131 (D. Mass. 2001); *Moser v. Anderson*, No. 93-634. 1996 U.S. Dist. Lexis 22637 (D.N.H. Nov. 25, 1996); *Kidd v. Gowen*, 829 F. Supp. 16 (D.N.H. 1993). **Second Circuit:** *Sorensen v. City of New York*, 42 Fed. App'x 507 (2d Cir. 2002); *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Wachtler v. County of Herkimer*, 35 F. 3d 77 (2d Cir. 1994); *Walsh v. Franco*, 849 F.2d 66 (2d Cir. 1988); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986); *Marriott v. County of*

Montgomery, 227 F.R.D. 159 (N.D.N.Y. 2005); *Maneely v. City of Newburgh*, 256 F. Supp. 2d 204 (S.D.N.Y. 2003); *Loeber v. County of Albany*, 216 F. Supp. 2d 20 (N.D.N.Y. 2002); *Murcia v. County of Orange*, 226 F. Supp. 2d (S.D.N.Y. 2002); *Lee v. Perez*, 175 F. Supp. 2d 673 (S.D.N.Y. 2001); *Gonzalez v. City of Schenectady*, 141 F. Supp. 2d 304 (N.D.N.Y. 2000); *Kelleher v. Fearon*, 90 F. Supp. 2d 354 (S.D.N.Y. 2000); *Mason v. Village of Babylon*, 124 F. Supp. 2d 807 (E.D.N.Y. 2000); *Betancourt v. Giuliani*, No. 97-6748, 2000 U.S. Dist. Lexis 1851 (S.D.N.Y. Dec. 26, 2000). **Fourth Circuit:** *Logan v. Shealy*, 660 F.2d 1007 (4th Cir. 1981); *Levinson-Roth v. Parries*, 872 F. Supp. 1439 (D. Md. 1995); *Smith v. Montgomery County*, 643 F. Supp. 435 (D. Md. 1986). **Fifth Circuit:** *Kelly v. Foti*, 77 F.3d 819 (5th Cir. 1996); *Watt v. City of Richardson Police Dept.*, 849 F.2d 195 (5th Cir. 1988); *Stewart v. Lubbock County*, 776 F.2d 153 (5th Cir. 1985); *Pitre v. Rodrigue*, 2001 U.S. Dist. Lexis 21830 (E.D. La. 2001); *Dugas v. Jefferson County*, 931 F. Supp. 1315 (E.D. Tex. 1996); *Holton v. Mohon*, 684 F. Supp. 1407 (N.D. Tex. 1987). **Sixth Circuit:** *Masters v. Crouch*, 872 F.2d 1248 (6th Cir. 1987); *Dobrowolsky v. Jefferson County*, 823 F.2d 955 (6th Cir. 1987); *Fann v. Cleveland*, 616 F. Supp. 305 (N.D. Ohio 1985). **Seventh Circuit:** *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Leinen v. City of Elgin*, No. 98-8225, 2000 U.S. Dist. Lexis 11747 (N.D. Ill. Aug. 14, 2000); *Jones v. Bowman*, 694 F. Supp. 538 (N.D. Ind. 1988). **Eighth Circuit:** *Jones v. Edwards*,

770 F.2d 739 (8th Cir. 1985); *Thomsen v. Ross*, 368 F. Supp. 2d 961 (D. Minn. 2005); *Does v. Ninneman*, 612 F. Supp. 1069 (D. Minn. 1985); *Does v. Boyd*, 613 F. Supp. 1514 (D. Minn. 1985); *Kathriner v. City of Overland*, 602 F. Supp. 124 (E.D. Mo. 1984); *Hunt v. Polk County*, 551 F. Supp. 339 (S.D. Iowa 1982). **Ninth Circuit:** *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir. 1990); *Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986); *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984).¹ **Tenth Circuit:** *Myers v. James*, No. 09-07001, 2009 U.S. App. Lexis 15848 (10th Cir. July 16, 2009); *Ellis v. Sharp*, 1994 U.S. App. Lexis 20602 (10th Cir. 1994); *Chapman v. Nicholas*, 989 F.2d 393 (10th Cir. 1993); *Hill v. Bogans*, 735 F.2d 391 (10th Cir. 1984); *Foote v. Spiegel*, 995 F. Supp. 1347 (D. Utah 1998); *Draper v. Walsh*, 790 F. Supp. 1553 (W.D. Okla. 1991).

Every district court within the Third Circuit has reached the same conclusion. *See, Allison v. GEO Group*, 611 F. Supp. 2d 433 (E.D. Pa. 2009); *Delandro v. Co. of Allegheny*, No. 06-927, 2009 U.S. Dist. Lexis 111979 (W.D.

¹ In *Bull v. City & County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008), a three judge panel of the Ninth Circuit declared unconstitutional a blanket strip search policy implemented by the San Francisco Sheriff's Department. Of the three, one judge dissented and one judge concurred reluctantly, arguing that, although existing Ninth Circuit precedent mandated the result, the holding gave inadequate weight to the proof of a contraband smuggling problem. The court agreed to hear the issue *en banc* on Feb. 20, 2009. *See Bull v. City & County of San Francisco*, 558 F.3d 887 (9th Cir. 2009) (granting rehearing *en banc* and vacating panel opinion).

Pa. Sept. 1, 2009); *Martinez v. Warner*, No. 07-3213, 2008 U.S. Dist. Lexis 44395 (E.D. Pa. June 5, 2008); *Owens v. County of Delaware*, No. 95-4282, 1996 U.S. Dist. Lexis 12098 (E.D. Pa. Aug. 15, 1996); *Newkirk v. Sheers*, 834 F. Supp. 772 (E.D. Pa. 1993); *DiLoreto v. Borough of Oaklyn*, 744 F. Supp. 610 (D.N.J. 1990); *Ernst v. Borough of Fort Lee*, 739 F. Supp. 220 (D.N.J. 1990); *Wilkes v. Borough of Clayton*, 696 F. Supp. 144 (D.N.J. 1988); *O'Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429 (D.N.J. 1988); *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987); *Roderique v. Kovac*, No. 85-5778, 1987 U.S. Dist. Lexis 8335 (D.N.J. Sept. 14, 1987)).

This Court should adopt the same principle of law for the Third Circuit. The decisions of sixty courts over the past three decades reflect the constitutional balance of the competing concerns of privacy and security embodied in the Fourth Amendment as set forth by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 555-56 (1979). The single Eleventh Circuit opinion to the contrary, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), is an outlier, is based on an erroneous interpretation of *Bell v. Wolfish*, and should be rejected.

ARGUMENT

I. THE FOURTH AMENDMENT FORBIDS A BLANKET STRIP SEARCH POLICY OF NON-INDICTABLE ARRESTEES WITHOUT REASONABLE SUSPICION THAT THE ARRESTEE IS CONCEALING CONTRABAND.

The Fourth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, reads:

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

U.S. Const. amend. IV (emphasis added). When the Fourth Amendment applies, that is, when the government action constitutes a search or seizure, it protects *all* Americans from unreasonable state action. *Cf. Katz v. United States*, 389 U.S. 347 (1967).

This freedom from unreasonable search and seizure does not stop at the jailhouse door. It is well-settled law that prisoners retain the protections afforded by the Constitution, which includes the Fourth Amendment right to be free from unreasonable search and seizure. “There is no iron curtain drawn between the Constitution and the prisons of this country.” *Bell v. Wolfish*, 441 U.S. 520, 555-56 (1979).

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court addressed a Fourth Amendment challenge to a policy at the federal Metropolitan Correctional

Center (“MCC”) in New York City to conduct a body cavity search of every detainee following a contact visit with a person from outside the institution. The Second Circuit had affirmed the district court’s holding that a policy of body cavity searches after contact visits without probable cause was unconstitutional.

The Supreme Court began with the principle that it was weighing two important considerations when applying the Fourth Amendment to policies in detention facilities. The Court emphasized that “[t]here must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” *Id.* at 545. In particular:

[i]n each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

441 U.S. at 559. Turning to the body cavity search policy at issue, the Supreme Court was persuaded by the justification for the searches advanced by the defendants: the risk that detainees would use contact visits as an opportunity for “[s]muggling of money, drugs, weapons, and other contraband” into the MCC. *Id.* at 559. After a description of correctional facilities’ unique issues with contraband smuggling, and recognition of how inmates are known to attempt to gain contraband by concealing them on their person, the *Bell* Court cited two Circuit Court cases that “document” this problem. *Id.* Both cases concern the smuggling

of contraband *during a planned contact visit*: *Ferraro v. United States*, 590 F.2d 335 (6th Cir. 1978); *United States v. Park*, 521 F.2d 1381 (9th Cir. 1975).

The Court also found that general deterrence justified the policy. The court suggested that widespread knowledge of the MCC's policy among the prison population would serve not only the limited purpose of recovering contraband, but also would deter prisoners from attempting to smuggle items in the first place. *Bell*, 441 U.S. at 559. The Court pointed to the fact that only one inmate at the MCC had ever been discovered smuggling contraband on his person following a contact visit as proof of the efficacy of the policy. *Id.* (“[A] testament to the effectiveness of this search technique as a deterrent . . .”).

Based on these justifications, unique in the context of prisoners returning to the general jail population *after* planned contact visits with friends or family, the Court reversed the holding of the Second Circuit and found the policy constitutional. It did so, even while recognizing “the practice gives us the most pause.” *Id.* The Court limited its ruling, however, by acknowledging that it was holding only that it was only “deal[ing] here with the question whether visual body cavity inspections as contemplated by the MCC rules can *ever* be conducted on less than probable cause.” *Id.* at 560 (emphasis in original). That is, the Court left for another day a consideration of searches conducted under other circumstances that would render the searches unreasonable.

II. THE FOURTH AMENDMENT REQUIRES AN INDIVIDUALIZED REASONABLE SUSPICION BEFORE STRIP SEARCHING A NON-INDICTABLE ARESTEE.

When the *Bell* analysis is applied to individuals who are arrested on a non-indictable offense and brought into a facility for the first time, the balance becomes quite different from that struck under the facts that were before the Supreme Court in *Bell*. With the notable exception of the Eleventh Circuit's en banc opinion in *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008), courts of appeals and district courts around the country have held that a "reasonable suspicion" is required before strip-searching a person who is arrested for a crime that does not itself suggest that the person is likely to be smuggling contraband. Reasonable suspicion may arise from the circumstances involved in the arrest, the person's behavior at the time of the arrest or a prior record suggesting a propensity to carry contraband. Reasonable suspicion may also arise from the crime that is charged so that courts have accepted strip searches when a person is charged with concealing drugs, weapons, or other contraband beneath their clothes. *See, e.g., Davis*, 657 F. Supp. at 400 ("[A] blanket policy covering *only* persons charged with felonies or with misdemeanors involving weapons or contraband arguably is justifiable because it is based on a reasonable generalization: that persons charged with these offenses are likely to be concealing weapons or contraband." (emphasis in original)).

The starting point for the analysis for courts around the country and for this Court is the unique emotional and psychological ramification of forcing arrestees to remove all clothing and be visually inspected by a stranger. In many different contexts—addressing issues other than the strip searches at issue here--the Supreme Court has found an individual’s interest in bodily privacy to be singularly compelling. Justice Sandra Day O’Connor once noted that “our notions of liberty are inextricably intertwined with our idea of physical freedom.” *Cruzan v. Dir. of Missouri Dep’t of Health*, 497 U.S. 261 (1990) (O’Connor, J., concurring). Justice O’Connor listed the many contexts in which the Supreme Court has uniquely protected bodily integrity. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952) (Due Process); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (Fourth Amendment) (“The integrity of an individual’s person is a cherished value of our society.”); *Winston v. Lee*, 470 U.S. 753, 759 (1985) (noting that certain searches can implicate expectations of privacy to such a magnitude that such procedures would be constitutionally unreasonable even when likely to produce evidence). The Fifth Circuit said it best when it recognized that “in a civilized society, one’s anatomy is draped with constitutional protection.” *United States v. Afandor*, 567 F.2d 1325, 1331 (5th Cir. 1978).

The facts presented by the cases involving blanket strip search policies demonstrate that the question is not simply an abstract matter of constitutional law.

It is an indignity that, when applied uniformly to any person who might be detained, regardless of the charge and without the need for suspicion, could be experienced by literally anyone. In *Tinetti v. Wittke*, 479 F.Supp. 486 (E.D. Wis. 1979), *aff'd* 620 F.2d 160 (7th Cir. 1980), the plaintiff was arrested for speeding but could not make the \$40 bond required of non-residents. Pursuant to a blanket policy of strip searching all recent arrestees, she was forced to strip naked in front of correctional officers for a mere traffic infraction. In *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983), the named plaintiffs, after arrest for outstanding parking tickets, were subject to Chicago's strip search policy. Pursuant to this policy, the women were forced to lift their blouses and remove their brassieres, then remove their skirt or pants and lower their undergarments, followed by instructions to bend and squat for the visual inspection of the vagina and anal areas by female corrections officers. *Id.* at 1267. And in the instant case, the plaintiff was forced "to remove all his clothing and, while nude, open his mouth, lift his tongue, hold his arms out, turn fully around, and lift his genitals" after being arrested for a civil contempt charge even though the fine had already been paid. *Florence v. Bd. Of Chosen Freeholders of Burlington*, 595 F. Supp.2d 492, 424-25 (D.N.J. 2009). "For offenses that are relatively minor, a strip search represents a grossly disproportionate consequence of arrest." *Allison v. GEO Group, Inc.*, 611 F. Supp.2d 433, 453 (E.D. Pa. 2009).

The scope of the intrusion caused by strip searches is not limited to the dehumanizing search itself, but continues with lasting effects. “Victims suffer a sense of helplessness and indignity but are often too shocked to be outraged. And, in at least several instances, the trauma has led to attempted suicide.” M. Margaret McKeown, *Strip Searches Are Alive and Well in America*, 12 Human Rights 37, 42 (1985). Psychologists report post-search symptoms that include “sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions.” *Id.* Besides post-search symptoms of psychological disorders, strip searches can have an irreversible effect on personal identity: “a systematic deprivation of privacy and dignity can weaken the individual’s sense of self.” David C. James, *Constitutional Limitations on Body Searches in Prisons*, 82 Col. L. Rev. 1033, 1049-50 (1982). This weakening of personal identity may have the unintended consequence of “increas[ing] violent and irrational behavior.” *Id.* at 1050.

Weighed against these fundamental and serious privacy concerns, the courts have held that the justifications found sufficient in *Bell v. Wolfish* are simply not present in the context of individuals who are arrested for non-indictable offenses. “Unlike persons already in jail who receive contact visits, arrestees do not ordinarily have notice that they are about to be arrested and thus an opportunity to hide something.” *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001). As the court in

the most recent case from the Eastern District of Pennsylvania observed, the *Bell* Court found the blanket policy constitutional because of the reasonable suspicion inherent in *planned contact visits*. In stark contrast here, arrestees ordinarily do not have the opportunity to hide contraband on their person. In fact, if an arrestee possesses contraband, such items are likely to be found in the routine, and less intrusive, search incident to arrest. *See Allison v. GEO Group, Inc.*, 611 F. Supp.2d 433, 454 (E.D. Pa. 2009).

Moreover, unlike the deterrent effect that the Supreme Court believed to occur by mandating searches after contact visits, a blanket search of incoming arrestees – most of whom will have no advance notice of their detention – cannot achieve the strong deterrent effect cited by the *Bell* court. *See Giles*, 746 F. 2d at 617; *accord Roberts* at 111 (1st Cir. 2001) (“[T]he deterrent rationale for the *Bell* search is simply less relevant given the essentially unplanned nature of an arrest and subsequent incarceration.”). While it is conceivable that some individuals may purposefully get arrested to act as a “mule” to transport contraband into the facility, those cases are most likely to give authorities the reasonable, articulable suspicion that most courts demand.

Under the policies implemented by the Burlington County Jail and Essex County Correctional Facility, literally anyone can be subject to a strip search. It is difficult to imagine a justification so compelling as to subject every American with

the threat of having to undress in front a complete stranger, and manipulate and move their genitalia at that stranger's command.

III. THE COURT SHOULD NOT ADOPT THE REASONING OF THE ELEVENTH CIRCUIT IN *POWELL V. BARRETT*.

This Court should not adopt the reasoning of the single court of appeals to approve blanket strip searches of recent non-indictable arrestees, *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc).

In *Powell*, the plaintiffs challenged a blanket search policy under which every person booked into a county jail's general population was "subjected to a strip search conducted without an individual determination of reasonable suspicion to justify the search, and regardless of the crime with which the person was charged." *Powell*, 541 F.3d at 1307. The three-judge panel had denied the motion to dismiss, relying upon the prior Eleventh Circuit precedents holding that strip searches of persons detained for minor crimes are unconstitutional in the absence of reasonable suspicion: *Wilson v. Jones*, 251 F.3d 1340 (11th Cir. 2001); *Skurstenis v. Jones*, 236 F.3d 678 (11th Cir. 2000). The *Powell* court held that a blanket policy of strip searching even the most minor of offenders during their booking was constitutional, "provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case." *Powell*, 541 F.3d at 1314 (citation and footnote omitted). The court remanded the case for a factual

determination as to whether the plaintiffs' claims survived in light of this reinterpretation of *Bell*.

The *Powell* court reached this holding in broad, illogical strokes. First, it reasoned that, because the Supreme Court held that the particular strip search policy in *Bell* passed Constitutional muster, the Supreme Court necessarily must have rejected for all situations a standard that requires objective, individualized reasonable suspicion for conducting a strip search: "The Court in *Bell* addressed a strip search policy, not any individual searches conducted under it. The Court spoke categorically about the policy, not specifically about a particular search or an individual inmate." *Id.* at 1307. But it does not follow that the Court's holding on one particular policy, in the context of post-contact visits, necessarily rejects the reasonable suspicion standard in other contexts, particularly where the justifications found in *Bell* are not present. As the dissent observed, the majority holding "is too broad a constitutional principle to derive from an allegedly implicit holding of the Supreme Court. A more reasonable interpretation would be that the Supreme Court did not need to address the issue because reasonable suspicion was present in the evidentiary record based on the detainees' planned contact with outsiders knowing they would be returning to the general population of the detention center after the visit." *Id.* at 1316-17.

The court in *Powell* also unreasonably relied on a terse dissenting opinion by Justice Powell. Justice Powell asserted that the serious intrusion occasioned by the search at issue warrants “at least some level of cause, such as a reasonable level of suspicion.” From this, the *Powell* court, relying on Justice Powell’s “perspective inside the Court,” attributes to Justice Powell an understanding that the *Bell* majority approved *all* strip searches in all contexts: “Justice Powell dissented for one and only one reason, which was that the Court did not require reasonable suspicion for conducting the strip searches in that case.” *Id.* at 1307-08. But using a dissent to infer the scope of the majority holding is, as the *Powell* court acknowledges, “risky.” *Id.* An equally likely inference is that Justice Powell’s dissent was limited to the post-contact policy before him in *Bell*, and to his disagreement with the majority’s holding that such searches did not require any reasonable suspicion. Indeed, that is exactly what he said: “reasonable suspicion should be required to justify the anal and genital searches *described in this case.*” *Bell*, 441 U.S. at 563.

Finally, the *Powell* court was persuaded by a “momentous fact of Franciscan simplicity”: that the policy at issue in *Bell* has not been changed after the Supreme Court’s decision. 541 F.3d at 1308. The *Powell* court reasoned that the district court would have required reasonable suspicion if that was the holding of *Bell* and, since the policy remained in place, the district court must not have required

reasonable suspicion. This appeal to “logic” is incorrect. Whatever the understanding of the district court or the Bureau of Prisons in *Bell*, the fact was that the Supreme Court had *approved* the constitutionality of a policy in the context of post-contact visits.

At its core, the aberrant opinion in *Powell* is based on a studied refusal to acknowledge the important and relevant distinction between the strip searches at issue in *Bell*, which occurred after contact visits which would provide an opportunity for smuggling, and the search involved in this case, where an individual was arrested for a petty misdemeanor and the arrest was a surprise. To the majority’s suggestion that a person might position himself to be deliberately arrested in order to smuggle contraband, the dissent correctly responded that it is “unwarranted speculation.” 541 F.3d at 1318. If a person were, indeed, deliberately positioning himself for an arrest, it is highly likely that other circumstances would give law enforcement agents the very “reasonable suspicion” that would be required.

IV. OTHER AUTHORITIES CITED BY THE BURLINGTON COUNTY JAIL AND ESSEX COUNTY CORRECTIONAL FACILITY ARE NEITHER RELEVANT NOR PERSUASIVE AUTHORITY TO LEAD THIS COURT TO REJECT THE VIEW OF MOST OTHER CIRCUITS.

In their petition for interlocutory appeal and appellate brief, Burlington County Jail and the Essex County Correctional Facility cite additional cases as

support for their argument that the weight of authority is shifting and that this Court should permit a blanket strip search policy without reasonable suspicion for non-indictable arrestees. None of these cases offer persuasive or relevant authority.

Appellants argue that Justice’s Scalia’s footnote in *Veronica School District v. Acton*, 515 U.S. 646, 664 n. 3 (1995) disavows any reasonable suspicion standard in *Bell v. Wolfish*. In that footnote, Justice Scalia attributes to the dissenting justices an overly broad interpretation of *Bell* in which there is a “categorical protection” for all prisoners which requires a “strong preference for an individualized suspicion requirement.” *Id.* That indeed would be overly broad because in the particular context of post-contact visits, *Bell* rejected a requirement of individualized suspicion. It does not follow, however, that Justice Scalia’s quite correct observation about an overly-broad interpretation of *Bell* also amounts to a rejection of the reasonable suspicion standard that has developed for pre-incarceration individuals.

Clements v. Logan, also cited by the appellants, does not support overruling the vast weight of authority requiring the reasonable suspicion standard in the pre-detention context and, if anything, reflects the Supreme Court’s support of that standard. In that case the Supreme Court considered, but declined, an opportunity to overrule the line of cases requiring it. In *Logan v. Sheely*, 660 F.2d 1007, 1013

(4th Cir. 1981), the Fourth Circuit held that a policy of strip-searching all detainees regardless of the charge was unconstitutional. When the defendants were unsuccessful in obtaining a stay of the mandate from the Chief Justice, 454 U.S. 1304 (1981), they resubmitted an application for a stay to Justice Rehnquist who was then the Circuit Justice for the Fourth Circuit. Justice Rehnquist temporarily issued the stay, criticizing the Fourth Circuit's interpretation of *Bell*, until the full court could hear the issue. *Id.* The full court vacated Justice Rehnquist's temporary order, 454 U.S. 1117 (1981), and subsequently denied the defendant's petition for a writ of certiorari. *Clements v. Logan*, 455 U.S. 942 (1982). The most that can be read from the history of this case is that Justice Rehnquist spoke only for himself, but not for the Court.

Appellants cite to the Eighth Circuit's opinion in *Serna v. Goodno*, 567 F.3d 944 (8th Cir. 2009), but that case involved a challenge to constitutionality of a single strip search—not a policy-- of an individual who had been civilly committed to a facility for a substantial amount of time. The court cited *Bell* for the general principle that courts must balance the important considerations of privacy against the institutional security needs. That holding is not inconsistent with the vast majority of the case law which requires individualized suspicion before strip searching recent arrestees for non-indictable offenses. *Kelsey v. County of Schoharie*, 567 F.3d 54 (2d Cir. 2009), does not depart from the Second Circuit's

long-standing adherence to a requirement of reasonable suspicion because there, the court went out of its way to distinguish the clothing exchange at issue, in which an individual can block his or her naked body from the view of a correctional officer, from the strip search procedure which “clearly established” law in the circuit cannot be performed on a misdemeanor arrestee absent reasonable suspicion.

Finally, while acknowledging that this Court has not yet addressed the issue, appellants cite two cases from this Court, neither of which is relevant, much less controlling, as they deal with a distinctly different legal issues. In *Stevenson v. Carroll*, 495 F.3d 62 (3d Cir. 2007), the Court reviewed a due process challenge to inmate intake procedures and quoted the portion of the *Bell* decision that spoke to due process standards. In *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000), Mr. Fuentes was restrained after pleading guilty but before sentencing. In the course of evaluating Mr. Fuentes’ claim that the restraint deprived him of liberty in violation of his rights to due process of law, this Court cited *Bell*, explaining that certain pre-incarceration practices, such as restraints, may be constitutional, depending upon their purpose.

When surveying the entire landscape, the “tide” of judicial opinion has balanced personal privacy and prison security in the context of recent arrestees charged with petty misdemeanors. Requiring reasonable suspicion before strip

searching persons arrested for non-indictable offenses and, concomitantly, allowing strip searches of recent arrestees brought in for indictable offenses strikes a reasonable balance between the undisputed “feelings of humiliation and degradation associated with being forced to expose one’s nude body to strangers for visual inspection,” and “the essential goals” of “maintaining institutional security and preserving internal order and discipline.” *Martinez v. Warner*, No. 07-3213, 2008 U.S. Dist. Lexis 44395, at *42-43 & n.15 (quoting *Bell*, 441 U.S. at 545-46).

CONCLUSION

In 1880, Russian novelist Fyodor Dostoevsky, who himself had been incarcerated for political crimes, described the degradation experienced by his character, Mitya Karamazov, upon being forced to undress as he was being interrogated: “He felt unbearably awkward: everyone else was dressed, and he was undressed, and – strangely – undressed, he himself seemed to feel guilty before them, and, above all, he was almost ready to agree that he had indeed suddenly become lower than all of them, and that they now had every right to despise him.” *The Brothers Karamazov* 484 (Richard Pevear and Larissa Volokhonsky trans., Farrar, Straus and Giroux Books 2002) (1880). This transcendent principle of our humanity—that strip searches are tools for humiliation and dehumanization – is that which animates the current state of constitutional law. In asking this Court to

affirm the opinion below, we respectfully urge this Court to join the overwhelming majority of federal courts in recognizing that the unique psychological effects of strip searches visited upon any human being should be avoided in cases, like this one, where literally anyone could be the next target.

Jennifer R. Clarke
I.D. No. 49836
Public Interest Law Center of
Philadelphia
1709 Benjamin Franklin Pkwy., Second
Floor
Philadelphia, PA 19103

David Rudovsky
I.D. No. 15168
KAIRYS, RUDOVSKY, MESSING &
FEINBERG, LLP
The Cast Iron Building
718 Arch Street, 5th Floor
Philadelphia, PA 19106

On the Brief:

Christopher M. Sousa
Public Interest Law Center of
Philadelphia
1709 Benjamin Franklin Pkwy., Second
Floor
Philadelphia, PA 19103

Counsel for Amicus Curiae Prison Society of Pennsylvania

DATED: January 19, 2010

CERTIFICATE OF BAR MEMBERSHIP

I, Jennifer R. Clarke, certify that I am an attorney in good standing of the bar of
this Court.

Dated: January 19, 2010

Jennifer R. Clarke
Executive Director
Public Interest Law Center of Philadelphia
1709 Benjamin Franklin Pkwy., Second Floor
Philadelphia, PA 19003
(215) 627-7100
jclarke@pilcop.org

CERTIFICATE OF BAR MEMBERSHIP

I, David Rudovsky, certify that I am an attorney in good standing of the bar of this Court.

Dated: January 19, 2010

David Rudovsky
KAIRYS, RUDOVSKY, MESSING & FEINBERG, LLP
The Cast Iron Building
718 Arch Street, 5th Floor
Philadelphia, PA 19106
(215) 925-4400

drudovsky@krphila.com

CERTIFICATE OF COMPLIANCE

The brief complies with the word limit requirements of Fed. R. App. P. 37(a)(7)(B) because this brief contains 5,173 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii). This brief also complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

Dated: January 19, 2010

Jennifer Clarke

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Jennifer Clarke

CERTIFICATE OF SERVICE

I, Jennifer Clarke, hereby certify that on this 19th day of January, 2010, a true and correct copy of the foregoing brief was served electronically through the Court's Electronic Case Filing system upon the following:

Susan C. Lask, Esq.
Suite 2369
244 Fifth Avenue
New York, NY 10001

Stacy L. Moore, Jr., Esq.
Parker McCay
7001 Lincoln Drive West
3 Greentree Centre, P.O. Box 974
Marlton, NJ 08053-0000

Alan Ruddy, Esq.
Office of County Counsel
County of Essex
465 Martin Luther King Boulevard
Hall of Records, Room 535
Newark, NJ 07102-0000

Sean X. Kelly, Esq.
Sean Robins, Esq.
Marks, O'Neill, O'Brien & Courtney
6981 North Park Drive
Suite 300
Pennsauken, NJ 08091-0000

James M. Mets, Esq.
Mets, Schiro McGovern
655 Florida Grove Road
P.O. Box 668
Woodbridge, NJ 07095-0000

Ernest R. Bazzana, Esq.

Mary Massaron-Ross, Esq.
Plunkett Cooney
535 Griswold Street
Buhl Building, Suite 2400
Detroit, MI 48226-0000

I further certify that on this 19th day of January, 2010 the original and ten copies of the foregoing brief were send to the Clerk's Office of the United States Court of Appeals for the Third Circuit via First Class Mail, postage prepaid.

Jennifer R. Clarke