

Case No. 05-17080
(Consolidated with Case No. 06-15566)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARY BULL, et al.,
Plaintiffs/Appelles,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,
Defendants/Appellants.

**BRIEF OF AMICI CURIAE CALIFORNIA STATE
ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA
CITIES IN SUPPORT OF THE PETITION FOR PANEL
REHEARING AND REHEARING EN BANC SUBMITTED BY THE
CITY AND COUNTY OF SAN FRANCISCO**

On Appeal from the United States District Court
for the Northern District of California
(U.S. District Court No. C 03-1840 CRB)
The Honorable Charles R. Breyer

JENNIFER B. HENNING, SBN 193915
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, California 95814
Telephone: (916) 327-7535
Facsimile: (916) 443-8867

Attorney for Amici Curiae
California State Association of Counties
and League of California Cities

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	4
A. United States Supreme Court Precedent Dictates That Arrestees Can Be Subjected To Strip Searches Before Entering the General Population Without Reasonable Suspicion	4
1. The Supreme Court Upheld A Policy Strikingly Similar To The Policy At Issue Here	5
2. A “Balancing Test” Analysis Under <i>Bell v. Wolfish</i>	6
B. Strip Searches Of Pre-Trial Detainees Before Entering The General Population Are Consistent With The Balancing Test Established In <i>Bell</i>	8
1. There Is A Valid, Rational Connection Between The Disputed Policy And The Legitimate Governmental Interest Of Preventing Introduction Of Contraband Into The General Population	8
2. There Are No Alternative Means Of Exercising The Right To Privacy That Is Implicated By The Disputed Policy	9
3. The Panel’s Interpretation Of Detainee’s Right to Privacy Would Have A Significant Negative Impact On The Facility’s Guards, Staff, Visitors, and Other Inmates, And On The Allocation Of Prison Resources Generally	10
III. CONCLUSION	11
CERTIFICATION OF COMPLIANCE	13

TABLE OF AUTHORITIES

Cases

<i>Arruda v Fair</i> , 710 F.2d 886 (1st Cir. 1983).....	6
<i>Bell v. Wolfish</i> , 441 U.S. 520 (1979).....	passim
<i>Block v. Rutherford</i> , 468 U.S. 576 (1984).....	7
<i>Bull v. City and County of San Francisco</i> , 539 F.3d 1193 (2008).....	2, 10
<i>Dobrowolskyj v. Jefferson County, Kentucky</i> , 823 F.2d 955 (1987).....	7
<i>Goff v. Nix</i> , 803 F.2d 358 (8th Cir. 1986).....	6
<i>Jones v. North Carolina Prisoners' Labor Union, Inc.</i> , 433 U.S. 119 (1977)	4, 5
<i>Kraushaar v. Flanigan</i> , 45 F.3d 1040 (7th Cir. 1995).....	9
<i>Logan v. Shealy</i> , 660 F.2d 1007 (4th Cir. 1981).....	8
<i>Pell v. Procunier</i> , 417 U.S. 817 (1974).....	4, 5
<i>Powell v. Barrett</i> , 2008 U.S.App.LEXIS 18907 (11th Cir. Sept. 4, 2008)....	3
<i>Procunier v. Martinez</i> , 416 U.S. 396 (1974).....	4, 5
<i>Savard v. Rhode Island</i> , 338 F.3d 23 (1st Cir. 2003).....	8
<i>See Dufrin v. Spreen</i> , 712 F.2d 1084 (6th Cir. 1983).....	7
<i>Swain v. Spinney</i> , 117 F.3d 1 (1st Cir. 1997).....	8
<u>Other Authorities</u>	
<i>California Prisoners and Parolees</i> , California Department of Corrections and Rehabilitation, p. 34 (2006).....	1

I. INTRODUCTION

The issue of violence and drug use in this State's jails and prisons is one of critical importance to Amici Curiae California State Association of Counties ("CSAC") and the League of California Cities ("League").¹ Local law enforcement is on the front line in dealing with arrestees. Pretrial detainees begin their journey through the criminal justice system in our jails. Though Amici Curiae are not aware of any comprehensive study involving county jails and other local detention centers, the State prison system illustrates the serious problem of inmates obtaining contraband while incarcerated in the general population. In the latest data available, covering 2006, there were 14,490 incidents in our State prisons, which is a rate of 9.2 incidents per 100 inmates.² This is the highest incident rate in more than twenty years. Of these reported incidents, 1,869 involved assault with a weapon, 1,238 involved possession of a weapon, and 1,005 involved a controlled substance. This averages to more than 11 incidents per day in our State's prisons involving contraband.

¹ The interests of amici curiae are set forth the motion for leave to file this brief.

² The statistics in this paragraph are found in: *California Prisoners and Parolees*, California Department of Corrections and Rehabilitation, p. 34 (2006) [available at: http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf].

The dangers facing our local jail personnel, as well as our residents both visiting and incarcerated in our jails, is apparent from these facts. To address the documented problem in its jails, the City and County of San Francisco adopted a policy that intruded as minimally as possible. Detainees were subject to visual searches only when they were to be moved into the general population. The searches involved no touching, occurred in private, and were conducted by officers of the same gender.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the United States Supreme Court held that visual strip searches can be conducted without individualized, reasonable suspicion. Since then, this Court has reviewed on several occasions Fourth Amendment challenges to a variety of strip policies, creating a string of cases in which the Court has attempted to distinguish *Bell* based on a variety of factors. The result is binding precedent that led the panel in this case to conclude that a strip search similar in every critical aspect to the one upheld by the Supreme Court in *Bell* is unconstitutional.

Judge Ikuta, in her concurring opinion, felt compelled by Circuit precedent to reach this result, but urged reconsideration of the Ninth Circuit case law. (*Bull v. City and County of San Francisco*, 539 F.3d 1193, 1202 (2008).) An en banc Eleventh Circuit recently undertook a similar exercise.

It revisited its case law on this subject and concluded “a policy or practice of strip searching [arrestees] as part of the booking process” does not violate the Fourth Amendment, “provided that the searches are no more intrusive on privacy interests than those upheld in the *Bell* case.” (*Powell v. Barrett*, 2008 U.S.App.LEXIS 18907 (11th Cir. Sept. 4, 2008).)³

Amici CSAC and the League urge this Court to undertake a similar review. Rehearing is necessary for two reasons. First, the panel’s holding takes this Court further away from the Supreme Court’s ruling in *Bell* that blanket strip searches can be conducted on less than probable cause. Second, the panel’s decision is squarely at odds with the Eleventh Circuit’s recent holding that a policy or practice of searching all arrestees as part of the process of booking them into the general population of a detention facility is constitutionally permissible. (*Id.*)

///

³ In *Powell v. Barrett*, the Eleventh Circuit upheld a policy of the Fulton County, Georgia jail that required a visual strip search of inmates entering or re-entering the general population at that facility. (*Powell, supra*, 2008 U.S.App.LEXIS 18907 at *2-3.) Unlike the policy at issue in this case, the Fulton County policy required inmates to be searched in a group setting. (*Id.* at *5.) By comparison, San Francisco’s policy of private searches is even less intrusive than the policy upheld by the Eleventh Circuit in *Powell*.

II. ARGUMENT

A. United States Supreme Court Precedent Dictates That Arrestees Can Be Subjected To Strip Searches Before Entering the General Population Without Reasonable Suspicion

Between 1974 and 1977, the United States Supreme Court decided three important cases brought by prisoners raising constitutional claims challenging prison regulations or policies. In *Procunier v. Martinez*, 416 U.S. 396 (1974), the Court described the principles that frame an analysis of prisoners' constitutional claims. First, the regulation or practice in question must further "one or more of the substantial governmental interest of security, order, and rehabilitation." (*Id.* at 413.) Second, the limitation of the constitutional freedom "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." (*Id.* at 413-14.) The decision was followed by *Pell v. Procunier*, 417 U.S. 817 (1974) and *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which built upon *Martinez* in holding that that examination of prisoners' constitutional claims must occur with wide-ranging deference to prison administrators and authorities. (*Jones, supra*, 417 U.S. at 126-28.) Taken together, these decisions establish that a jail regulation or policy need only further the security interests of the jail to the

extent necessary, and that the judgment of jail administrators should be accorded great deference.

1. The Supreme Court Upheld A Policy Strikingly Similar To The Policy At Issue Here

In 1979, the Supreme Court decided the seminal case of *Bell v. Wolfish*, 441 U.S. 520 (1979). *Bell* specifically addressed “the constitutional rights of pretrial detainees – those persons who have been charged with a crime but who have not yet been tried on the charge.”⁴ (*Id.* at 523.) Among the complaints brought by the plaintiffs was the institution’s practice of conducting visual body-cavity searches after contact visits. (*Id.* at 527.)

The Court followed the holdings in *Martinez*, *Pell* and *Jones* and upheld the constitutionality of visual body-cavity searches very similar to the searches involved in the present case. The Court noted that “[c]orrections officials testified that visual cavity searches were necessary not only to discovery but also to deter the smuggling of weapons, drugs, and other contraband into the institution.” (*Id.* at 558.) The Court went on to use standard Fourth Amendment analysis and applied a balancing test in

⁴ The facility at issue in *Bell* included, in addition to pretrial detainees, “inmates . . . who are serving generally relatively short sentences in a service capacity, . . . witnesses in protective custody, and persons incarcerated for contempt.” (*Bell*, 441 U.S. at 524.) The policy applied to all of these categories of person. (*Id.*)

which it considered 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.” (*Id.* at 559.) This “balancing test” examination resulted in the Court’s conclusion that blanket strip searches can be conducted on less than probable cause. (*Bell*, 441 U.S. at 560.)

2. A “Balancing Test” Analysis Under *Bell v. Wolfish*

Jail detainees may constitutionally be subject to visual strip searches without individualized, reasonable suspicion. (*Bell v. Wolfish*, *supra*; *Arruda v Fair*, 710 F.2d 886 (1st Cir. 1983)(upholding the constitutionality of subjecting inmates to strip search after they receive visitors); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1986)(same).) The common thread and security concern in cases that have upheld such searches is a detainee’s physical access to and contact with the “outside world.” Such contact presents the opportunity for contraband to be introduced into the general jail population where it may result in physical harm to the detainees or jail personnel. Likewise, any pretrial detainee who has just been arrested and booked has been brought into the jail from the “outside world” and, presumably, has been under no supervision prior to arrest and detainment.

In *Bell*, it was noted that it would be extremely hard for a detainee to conceal contraband or weapons because the visits took place under observation. (*Bell*, 441 U.S. at 504 (J. Stevens, dissenting).) Yet the strip searches were constitutional. The potential for a new arrestee to have obtained and secreted illicit contraband is immeasurably greater than that of an incarcerated prisoner. (*See Bell v. Wolfish*, 441 U.S. at 546, n. 28 (“Indeed, it may be that in certain circumstances [pretrial detainees] present a greater risk to jail security and order”); *Block v. Rutherford*, 468 U.S. 576, 587 (1984)(“It is not unreasonable to assume . . . that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates”).)

Obviously, every pretrial detainee does not require a strip search because many are never booked into the general population. However, a detainee who will be introduced into the general jail population is a unique problem, as numerous courts have recognized. (*See Dufirin v. Spreen*, 712 F.2d 1084, 1087 (6th Cir. 1983)(strip search upheld where a pretrial detainee would ultimately come into contact with the general jail population); *Dobrowolskyj v. Jefferson County, Kentucky*, 823 F.2d 955 (1987)(upholding a strip search where detainee was not strip searched until his movement into the general population of the jail was imminent).

Compare Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981)(strip search unconstitutional where, *inter alia*, “[a]t no time would [the plaintiff] or similar detainees be intermingled with the general jail population”); *Swain v. Spinney*, 117 F.3d 1, 8 (1st Cir. 1997)(“There was no risk that [the detainee] would come into contact with other prisoners, or be able to smuggle contraband or weapons into a secure environment”); *Savard v. Rhode Island*, 338 F.3d 23, 29 (1st Cir. 2003)(“There are important differences between detaining an arrestee in virtual isolation and introducing an arrestee into the general population of a maximum security prison.”.)

B. Strip Searches Of Pre-Trial Detainees Before Entering The General Population Are Consistent With The Balancing Test Established In *Bell*.

1. There Is A Valid, Rational Connection Between The Disputed Policy And The Legitimate Governmental Interest Of Preventing Introduction Of Contraband Into The General Population.

Prison administrators are responsible for maintaining internal order and discipline, and for securing the safety, security and, to the extent possible given realistic constraints, the rehabilitation of the inmates committed to it. It cannot be disputed that a detention facility has a legitimate penological interest in preventing the introduction of weapons, drugs, money, and other contraband into the general inmate population.

Such paraphernalia can present a danger to inmates, guards, staff and visitors, can result in discipline problems, and can inhibit the rehabilitation of detainees (particularly with regard to drug use). The use of strip search is both exceptionally effective and directly related to the goal of keeping the general jail population free from dangerous and/or disruptive paraphernalia.

2. There Are No Alternative Means Of Exercising The Right To Privacy That Is Implicated By The Disputed Policy.

A policy such as the one at issue in this case is designed to be as unobtrusive as possible. It is only visual. There is no touching. It is conducted in private by an officer of the same gender. The point of a strip search is to search the subject's private areas for contraband and illicit material; any alternative to this invasion would render the policy pointless.⁵ The intrusion of an individual inmate, though highly personal, is substantially outweighed by the institutional interest in protecting its staff, guards, visitors, and the prison population at large.

The policy at issue here goes no farther than is necessary to accomplish its stated goals. There is no evidence in the record that the need for the policy has been exaggerated by corrections officials. And as

⁵ “Where an arrestee is wearing blue jeans or another heavy material, even the most thorough patdown search will not necessarily turn up small items such as several hits of LSD on postage stamps, a small rock of crack cocaine, or a razor blade.” (*Kraushaar v. Flanigan*, 45 F.3d 1040, 1046 (7th Cir. 1995).

established above, the judgment of such officials demands judicial deference.

3. The Panel's Interpretation Of Detainee's Right to Privacy Would Have A Significant Negative Impact On The Facility's Guards, Staff, Visitors, and Other Inmates, And On The Allocation Of Prison Resources Generally.

As noted above, the latest statistics available from the State prison system show that incidents involving contraband are shockingly common and on the rise. This situation is a real and dangerous reality in our local jails as well. As the dissent noted, the record in this case is "replete with incidents of jail officials finding contraband during strip searches," including those arrested for minor offenses. (*Bull, supra*, 539 F.3d at 1206.) An amicus brief was also filed by San Mateo County detailing its similar experience with the problem of smuggling contraband. It is a significant issue that jail administrators must address.

The purpose of the strip search policy is to prevent the introduction of weapons, drugs, money and other illicit material into the general jail population. By virtue of this goal, and the nature of the strip search itself, the only possible accommodation would be to limit strip searches to suspicious cases. This would defeat the goal of the policy. It is clear, and readily acknowledged by the Supreme Court, that "inmate attempts to

secrete [contraband] into the [detention facilities] by concealing them in body cavities are [well] documented.” (*Bell*, 441 U.S. at 559.)

Alternative methods of search and detention, such as metal detectors, are inherently incapable of revealing the myriad of objects and materials that a visual search would turn up.⁶ Not all weapons are made of metal. Certainly paper money, drugs, stamps, cigarettes, and a host of other materials could pass through such a device undetected. Ultraviolet and infrared detection devices are similarly unreliable. Further, said devices are costly, and requiring their purchase would further strain the resources of an already under-funded operation.

III. CONCLUSION

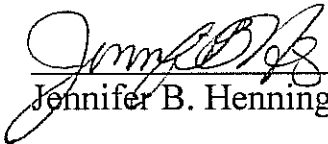
The panel’s decision has moved the Ninth Circuit beyond the United States Supreme Court’s rulings on the issue of pretrial detainee strip searches. It directly conflicts with case law of another circuit. And it dangerously underestimates the seriousness of the problems faced by local jails in booking pretrial detainees into the general population. As such,

⁶ It should be noted, however, that “[g]overnmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional.” *Bell*, 441 U.S. at 542, n. 25.

Amici Curiae urge this Court to grant San Francisco's petition and affirm the city's strip search policy.

Dated: October 15, 2008

Respectfully Submitted,



Jennifer B. Henning, SBN 193915

Counsel for Amici Curiae
California State Association of Counties
and League of California Cities