Strip Searches of Arrestees at the Jail

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Jeff wrote earlier this week about roadside strip searches. Today's post is about strip searches of arrestees as they are booked into the jail.

The longstanding rule regarding searches of arrestees as they are processed into the jail is that they may not be strip searched without *reasonable suspicion* that they are concealing a weapon or some other contraband. In many cases from across the country, including the Fourth Circuit, policies of strip searching all arrestees are held unconstitutional, sometimes leading to personal liability for the sheriff and jailer. *See* Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981) (strip search of a DWI arrestee had no "discernible relationship to security needs at the Detention Center that, when balanced against the ultimate invasion of person rights involved, it could reasonably be thought justified").

The Supreme Court set out the general test for evaluating the Fourth Amendment reasonableness of inmate searches in *Bell v. Wolfish*, 441 U.S. 520 (1979). In that case, a group of inmates (including some pretrial detainees) at a federal facility in New York argued that the facility's strip search policy violated their Fourth Amendment rights. The policy required all inmates, regardless of the reason for their detention and without any individualized suspicion, to "expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Id.* at 558. The policy required males to "lift their genitals and bend over to spread [their] buttocks for visual inspection," and required the visual inspection of females' vaginal and anal cavities. The Supreme Court upheld the searches, applying a balancing test that weighed the government's need to conduct the particular type of search against the intrusiveness of the search and the place and manner in which it was conducted.

That the visual body cavity searches in *Bell* were upheld might make you think that lesser intrusions—like, for example, viewing arrestees in a state of undress as they process into the jail—would also be upheld. They have not been. The distinction courts typically make is that *Bell* involved inmates already processed into the jail returning from contact visits with outsiders as opposed to arrestees arriving at the jail for the first time. Courts generally accept the argument that arrests, unlike contact visits, are unplanned events that don't allow arrestees time to hide contraband on their person, and so a policy of strip searching all arrestees is unreasonable under the Fourth Amendment.

Recently, however, decisions from two federal appellate courts cast doubt on the arrestee/contact visit distinction and, consequently, on the strength of the rule against blanket arrestee strip searches.

In *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008)(en banc), the Eleventh Circuit upheld a jail's blanket policy of conducting full body visual strip searches of all detainees being booked into the general jail population. The court ruled en banc that the booking procedures of the Fulton County Jail in Atlanta, where, by policy, officers inspect the naked front and back of all arrestees as they undressed, showered, and changed into jail-issued clothing, were not unreasonable under the Fourth Amendment. The court said the "security needs that the Court in *Bell* found to justify strip searching an inmate re-entering the jail population after a contact visit are no greater than those that justify searching an arrestee when he is being booked into the general population for the first time." *Id.* at 1302. Indeed, the court said, initial processing is much like coming into the jail after "one big and prolonged contact visit with the outside world." *Id.* at 1313.

The court also challenged head-on the notion that arrestees are generally unprepared for the moment of arrest and therefore unlikely to have concealed items on their person before entering the jail. Even in routine traffic stops, the court said, arrestees often have time to secrete items "before the officer reaches the car door." Many people surrender on their own when notified of an outstanding warrant; some, particularly, gang members, might deliberately get arrested just to smuggle contraband into the jail. These arrestees, who have "all the time they need to plan their arrests and conceal items on their person," present no less a danger to institutional security than the post–contact visit inmates in *Bell*, and the reasonableness of strip searching them ought therefore to be evaluated similarly.

Just last week in *Bull v. City and County of San Francisco*, __ F.3d __ (9th Cir. 2010)(en banc), the Ninth Circuit upheld a sheriff's policy requiring strip searches of all arrestees introduced into the city's general jail population. The San Francisco sheriff instituted the policy in response to the discovery of over 1,500 contraband items in the general jail population in a three-year period, including, among other things, 106 shanks, 17 handcuff keys, and 24 gallons of homemade alcohol. Under the policy, officers required arrestees to "remove or arrange some or all of [their] clothing so as to permit a visual inspection of the underclothing, breasts, buttocks or genitalia of such person." Officers were not allowed to physically touch inmates, and searches were to be performed in a professional manner in an area of privacy. Like the Eleventh Circuit in *Powell*, the Ninth Circuit determined that the sheriff's policy in San Francisco was not meaningfully different in terms of scope, manner, or justification from the visual body cavity search policy upheld by the Supreme Court in *Bell v. Wolfish.*

The decisions in *Powell* and *Bull* set up a circuit split that may lead the Supreme Court to weigh in. (If it does, there is some speculation as to whether Justice Breyer would recuse; his brother, Judge Charles Breyer of the Northern District of California, was the trial judge in the *Bull* case.) Until it does—or until the Fourth Circuit reconsiders the issue—jailers in North Carolina should continue to limit arrestee strip searches to circumstances where an officer reasonably suspects the arrestee possesses contraband.